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Supreme Court of The United States

NO

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of The United States

October Term — 1960

COMPANIA NACIONAL DE NAVEGACAO CASTEIRO PATRIMONIO,

Petitioner

v.

THE CABINS TANKER INDUSTRIES, INC. ET AL,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Compania Nacional de Navegacao Casteiro Patrimonio, owner of the Brazilian M/V RIO MARACANA, prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Fourth Circuit, entered in the above case on January 4, 1961; Petition for Rehearing denied on February 27, 1961, with one member of the court dissenting, as he would have granted the petition.

CITATION TO OPINIONS BELOW

The memorandum opinion of the District Court is reported in 182 F. Supp. 811. The opinion of the Circuit Court of Appeals for the Fourth Circuit is printed in 285 Fed. (2d) 592. Both opinions are printed in the Appendix hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 4, 1961. The jurisdiction of this Court is invoked under the provision of Title 28, U. S. C. 1254 (1).

QUESTIONS PRESENTED

I. WHETHER OR NOT THE BURDEN OF PROOF ON A SHIP WHOSE LIABILITY ARISING OUT OF A COLLISION HAS BEEN ESTABLISHED, IN ORDER TO RENDER THE OTHER VESSEL ALSO LIABLE, IS PROOF "BEYOND A REASONABLE DOUBT" OR PROOF IN ACCORDANCE WITH THE PREPONDERANCE OF THE EVIDENCE.

II. WHETHER OR NOT AS A MATTER OF LAW A MOVING VESSEL MUST MAINTAIN A CAREFUL LOOKOUT AND KEEP OUT OF THE WAY OF A DRIFTING VESSELL, PARTICULARLY WHERE THERE IS A DANGER OF COLLISION.

III. WHETHER OR NOT THE COURT BELOW ERRED AS A MATTER OF LAW IN AFFIRMING THE DECISION OF THE DISTRICT COURT WHILE AT THE SAME TIME MAKING A FINDING OF FACT NOT SUPPORTED BY THE EVIDENCE AND IN COMPLETE CONFLICT WITH THE FINDINGS OF THE DISTRICT COURT JUDGE.

STATEMENT

This matter deals with the issue of liability involved in a collision between a tanker, THE CABINS, and a dry cargo vessel, M/V RIO MARACANA, which occurred in the vicinity of the Maryland Pilot Station at the entrance to Chesapeake Bay, on November 16, 1956, off Cape Henry. The "RIO MARACANA" was a disabled, drifting vessel, "not under command." "THE CABINS" was a deeply laden tanker, inbound for Baltimore. The owner of the latter named vessel filed a libel against the dry cargo ship and her owner, who in turn filed a cross libel. The case was tried on the issue of liability on December 16 and 17, 1957, the District Court for the Eastern District of Virginia rendering its opinion on March 8, 1960, holding the "RIO" solely to blame. An appeal was taken to the United States Court of Appeals for the Fourth Circuit and argued on October 5, 1960. The latter Court affirmed the opinion on January 4, 1961. A Petition for Rehearing was denied on February 27, 1961, with one of the three judges who sat stating he would have granted the rehearing. (Appx. 60a)

The District Court Judge, for the most part correctly found the facts and so stated in his opinion. The times of the various maneuvers referred to hereinafter will be as stated by that Court. For clarification, a photo copy of libellant's Exhibit 2-A showing the location of the buoys and the approach of "THE CABINS" is attached to the back of the appendix. The courses steered by the tanker, according to its course recorder, are outlined thereon.

"THE CABINS" collided with the drifting "RIO" on the evening of November 16, 1956, at 2106 hours (9:06 P. M.) The collision occurred in Inland Waters, just inside the line of demarcation between Inland and International Waters. The night was clear, the sea smooth and visibility was good. The wind was from the southeast, approximately ten to twelve miles per hour, and the flood tide was setting in a northwesterly direction at a velocity of about one knot. (Francis Appx. 36a) (Perez Appx. 3a) (Current Tables Atlantic Coast, Lib. Ex. 5, page 146).

The "RIO" inbound for Norfolk, approached the Pilot Station off Cape Henry at about 2030 (8:30 P. M.), and as she reduced speed preparatory to boarding her pilot, she experienced an engine failure and found it necessary to drop anchor. (Perez Appx. 4a) She anchored at 2035, and at 2040 Captain R. C. Francis, a veteran pilot of the Virginia Pilots' Association, with some forty years experience, came aboard and advised the master that he was anchored in a restricted area, and would have to move. (Memorandum Opinion District Court, Appx. 41a). He was told by the pilot to take

in the anchor, and that they would then drift to the northwestward with the southeast wind and flood tide, out of the restricted area, and until the engine was ready. (Francis Appx. 36a) The ship which had been headed to the southeast (Francis Appx. 37a) swung around to her port, until her bow was headed in a northerly direction. She then commenced to slowly drift in a northwesterly direction. (Memorandum Opinion District Court Court Appx.). ***Please note this direction, northwest, is the same as the direction in which "THE CABINS" was headed:*** At this time there was no other ship traffic in the area.

The District Court, contra to the finding of the Court of Appeals (Appx. 45a), found this swing was completed by 2058 or 2059, at the latest, and not when the two ships were *in extremis* and only two lengths apart.

In his opinion Judge Hoffman expressly found the "RIO's" anchor was aweigh at 2055 or 2056 (10-11 minutes before collision) and that the vessel then swung to the north in approximately two or three minutes:

> "* * * An appropriate estimate of the time when the anchor was aweigh is 2055 or 2056."
>
> "The 'RIO's' pilot described the course of the vessel by stating that she 'spun around like a top' after the anchor was up. The head swung around to a NNE heading and commenced drifting towards the northwest. By reasons of its light draft, the heading from south to north was accomplished in approximately 2 to 3 minutes." (Memorandum opinion District Court Appx. 43a)

It is readily apparent the swing was completed by 2058 or 2059 at the latest. The collision was at 2106. ***Nowhere is there a finding of fact by Judge Hoffman that the swing was completed when the tanker was only two ship lengths distant, as found by the Circuit Court.***

Prior to taking in the anchor, the "RIO" was exhibiting two white anchor lights, and on taking in the anchor these lights were extinguished and her underway lights, that is, her red and green side lights, and her two white masthead lights were turned on. In addition to this, two red "all around "out of command lights were hoisted above the bridge, a distance of six feet apart, in a vertical line. (Perez Appx. 5a; Francis Appx. 36a) Initially kerosene lighting elements were utilized in these red lights, but shortly after they had been put up, these elements were replaced with electric filaments. (Perez Appx. 6a) (Kliemczak Appx. 14a) (Leitao Appx. 16a)

Those on the "RIO" sighted "THE CABINS" approaching from the southeast when she was several miles away. At this time, and for some time thereafter, "THE CABINS" was proceeding northwesterly (312-316° T.) and the "RIO" was drifting northwesterly (Approximately 315° T.) so for all intents and purposes the drifting of the "RIO" can be disregarded, and the situation is the same as if the "RIO" had been a stationar yvessel. Furthermore, both vessels were subject to the same tide, or on the "same carpet" and hence, the only relative movement between the two was the movement created by "THE CABINS". There

is no evidence in the record to support the Lower Court's statement that the "RIO" drifted across the path of "THE CABINS". In fact, in support of its finding on this point, the District Court seemed to have confused "heading" with the direction of drift, for in his opinion, Judge Hoffman said:

> "Acting under the pilot's orders the anchor was heaved, and the vessel drifted on the tide and wind from her southeasterly heading, to her left in a semi-circle to a generally northerly heading away from the restricted area and directly toward the path of "THE CABINS". (Memorandum Opinion of District Court Appx. 41a)
>
> * * *
>
> "The pilot was likewise aware of the fact that the "RIO", if permitted to drift, would cross the intended path of "THE CABINS". (Memorandum Opinion of District Court Appx. 42a).
>
> "The head (bow of 'RIO') swung around to aNNE heading, and *commenced drifting towards the northwest*" (Italics ours) (Memorandum Opinion of District Court Appx. 43a).

It is true that the bow of "RIO" swung from the southeast around to a northerly heading, but she then drifted with the southeast wind and flood tide in a northwesterly direction, and this fact, which has been found by the court below (see above) is not in dispute. (Francis Appx. 37a; Perez Appx. 7a).

"THE CABINS" was inbound from the southeast for Baltimore. She had called the Maryland pilot vessel by radio telephone and had been told that the

pilot launch would meet her in the vicinity of Buoy "2A". All of her course changes and reduction in speed from this moment until 2104½ (one and one-half minutes before the collision) when she went half astern, were made with regard to meeting the pilot launch at Buoy "2A" and not because of the presence of "RIO". (Smith Appx. 32a).

"THE CABINS", on arrival at Buoy "2-CB" passed this buoy, keeping it to starboard at a distance of about one-half mile and changed course to 312° T. in order to head for the general vicinity of Buoy "2A". (Reed Appx. 17a). She was making her full sea speed of fourteen and one-half knots at this time and she varied her heading slightly to make good her base course of 312° T. At 2048 she noted "arrival" in her log book and reduced speed to her full maneuvering speed of about 12 knots. (70 rpm) (Reed Appx. 17a) About two minutes after this those, in charge of "THE CABINS" observed the lights of the "RIO" "apparently working with the pilot boat, either discharging or taking on a pilot." (Reed Appx. 22a; Smith Appx. 24a) At this time "RIO" was about three to three and one-half miles away. (Reed Appx. 19a). At 2053 speed was reduced to half ahead at 2053½ to slow ahead. (Engine room bell book, Resp. Ex. 2). At 2057 course was changed to 316° T. to head for Buoy "2-A". (Reed Appx. 18a; Smith Appx.). At 2058, eight minutes prior to collision, Captain Smith, of the tanker, was for the first time made aware of the helpless condition of the "RIO MARACANA". As found by the District Court:

> "* * * THE CABINS' master admitted having seen one red light above the "RIO's" bridge

deck house at approximately the same time he observed the green starboard running light which was at or about 2058. "THE CABINS' Chief Officer indicated that he had initially seen a single red light that showed up momentarily over the 'RIO's' bridge, but that it thereafter disappeared. The testimony of 'THE CABINS' master is somewhat evasive and contradictory as to what he then did upon seeing the red light and the green light. On direct examination he states that this occurred at 2104, only two minutes prior to the collision, whereas he had previously stated at the Coast Guard hearing that he noted the green and red lights at approximately 2058, about eight minutes before the collision. *The latter estimate of time appears to be more worthy of belief."* (Appx. 45a) (Italics ours). (Memorandum Opinion of District Court Appx.)

THE CABINS' master actually considered the 'RIO' might be an 'out of command vessel' when he first saw the extra 'red light above his (the 'RIO's') deck house' at a distance of 'approximately three-quarters of a mile. (see Appx. 31a).

After altering course to 316° "THE CABINS" settled on a heading of 315° and at 2101 she reduced speed to a dead slow ahead, about six knots. (Reed Appx.). At 2101 (course recorder time) she changed course inexplicably to the right to 338°. At 2303 (course recorder time) she commenced a left swing. At 2104½ she went half astern (Engine Room Bell Book, Resp. Ex. 2). At 2105 a full astern order was given, followed fifteen seconds later by a full ahead, at 2105 1/4. At 2106 the collision occurred with the port side of "THE CABINS", in the way of tanks

Nos. 3 and 4, coming into contact with the bow of the "RIO", at a 90° angle, the bow of "RIO" scraping down the side of "THE CABINS." (Reed Appx. 21a) (Memorandum Opinion of District Court Appx. 50a).

REASONS FOR GRANTING THE WRIT

I. The Court below seriously erred as a matter of law in establishing an erroneous rule of evidence insofar as the burden of proof in ship collision cases is concerned and directly *contra* to this Court's decision in *the CITY OF NEW YORK,* 147 U. S. 72, 85.

In its *per curiam* opinion the Court of Appeals stated as follows:

> "The case is a typical one for the application of the established rule that when the fault on the part of one vessel in a collision, sufficient to account for the disaster, is established by uncontroverted proof, it is not enough to raise doubts about the management of the other vessel, but in order to hold her liable there must be *proof of fault beyond a reasonable doubt.*" (Italics ours) (Appx. 59a).

There is no rule of evidence more firmly settled than that requiring issues of fact in civil litigation to be determined in accordance with the *preponderance of the evidence. New York L. Ins. Co.* v. *Gamer,* 303 U. S. 161; *Fidelity Mut. Life Asso.* v. Nettler, 185 U. S. 308; and *Williams* v. *Conger,* 127 U. S. 397. Only in criminal matters is the degree of proof required that of the establishment of guilt *beyond a reasonable doubt* of the crime charged. *Holt* v. *United States,* 218 U. S. 245.

The Court of Appeals has established a new standard of proof in admiralty litigation, and completely *contra* to that set by Mr. Justice Brown in *the City of New York,* 147 U. S. 72, 85, where he stated:

> " * * * Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel, there is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor * * *"

Also, see the cases cited in *Griffin on Collision,* 1949 Edition, Sec. 224, "Major and Minor Faults". It is manifestly clear that there is no existing law that one ship at fault in a collision, in order to invite a division of damages, must make out the fault on the part of the other ship involved by *proof beyond a reasonable doubt.* Such a rule of evidence entirely distorts and changes the law of evidence relative to the burden of proof in admiralty litigation, and the importance of this question alone is sufficient to merit the granting of a writ.

II The lower court, in affirming the decision of the District Court completely disregarded the duty owed by a moving vessel to adopt every proper precaution required by the special circumstances of the case to prevent a collision, and particularly that of maintaining a careful lookout and taking constant bearings, contrary to the decision of this Court in *The SUNNYSIDE,* 91 U. S. 208.

The District Court glossed over the failure of THE CABINS to produce its lookout and helmsman, while the Court of Appeals made no mention of the fact, in spite of the tanker's failure to render any explanation for not presenting their testimony. (Appx.) Neither Court mentioned the inference in law which arises that the evidence of such witnesses would not have been favorable. See *The NEW YORK,* 175 U. S. 187, 204; *The GEORGETOWN,* 135 Fed. 854; *The POCOMOKE,* 150 Fed. 193, 196; *The CANANOVA,* 297 Fed. 658; The BRIGHT, (2 Cir) 45 F. 2 (d) 150.

The law was heretofore correctly applied by this Court in *The SUNNYSIDE,* supra, the facts of which are strikingly similar. That matter dealt with a case of special circumstances, as was the instant situation. The litigation concerned a collision between a drifting tug and a sailing vessel under way. Both were found at fault and the damages were divided. As to the faults of the sailing vessel, this Court stated at pp. 218-20:

> "Negligence more manifest, cupable or defensible, in view of the circumstances, is seldom exhibited in controversies of this character;and the only excuse offered for it is, that the 18th Sailing Rule provides that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification, that, in obeying and construing the rule, due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, rendering a departure from the rule necessary in order to avoid immedaite danger.

"Years before the Act of Congress referred to was passed, this court promulgated the doctrine, that rules of navigation are adopted to prevent collision, and to save life and property at sea, and not to promote such disasters; and decided that the *neglect of one or two approaching vessels to show the signal-lights required by law did not vary the obligations of the other to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision as the circumstances in which she was placed gave her the opportunity to employ.*" (italics ours)

"Vigilance as well as experience is required of a lookout; and, if he is inattentive to his duty, it is no sufficient excuse to say that he was competent to perform the required service. No doubt the bark had a lookout; and the evidence tends to prove that he was competent; but his own testimony shows conclusively that he did not properly perform his duty after the mate came forward and returned aft. He admits that he could not tell whether, at that time, the steam tug was stationary or in motion; and he must have known that the mate left the forecastle and went aft as ignorant upon the subject as he himself was.

"Suppose that was so, and there is no apparent reason to doubt it, then it was his plain duty, the moment he ascertained that the lights ahead were stationary, to have reported that fact to the mate as officer of he deck. Steamers in motion, the mate might think would take care of themselves; but the lookout could not know what the mate would think if he should be informed that the lights were stationary.

"*Viewed in the light of the circumstances, it is obvious that the mate and lookout of the bark*

had abundant time to have determined whether the steam tug was in motion, or only drifting, if they had used common care and ordinary vigilance in that regard, as they were bound to do; nor would there have been any difficulty in avoiding the collision, if proper precaution had been seasonably adopted for that purpose; and, inasmuch as no such precaution was taken by those in charge of the deck of the bark, it follows that she also is in fault, and must answer for her proportion of the loss occasioned by the collision, *as the fault of the steam-tug does not excuse the fault of the bark, if the latter was in any substantial degree a contributory cause of the collision.* The Ariadne, 13 Wall. 479, 29 L Ed. 543." (Italics ours)

In the instant case, the RIO was a sitting duck, without motive power and incapable of taking any action to keep out of the way of the tanker, which could have readily avoided the collision by a few degrees change of course, or by maintaining the change of heading taken up at 2103 in her course change from 316° to 338°, or by going astern in time to kill her headway. None of these courses of action were taken, regardless of the fact that at 2058 (as found by the District Court) her Master sighted one of the out of command lights above the bridge. This was also acknowledged by Captain Smith at the Coast Guard hearing held four days after the collision when he stated:

"The 'RIO MARCANA' when at approximate angle of three points on our port bow started turning to the left showing his red and green running lights, eventually showing his green light completely. I at that time had glasses in my hand

looking at him and noticed a red light above his bridge deck house." (Smith Appx. 26a).

"Q. Approximately how far was he from you when you first noticed his green light?

"A. Approximately three-quarters of a mile".

"Q. When you first noticed the green lgiht alone and the single red light, did you give any thought to the question as to whether the vessel was out of command or not?

"A. Yes, I did, that was another reason for putting the engines full astern.

"Q. Is that the same action you would have taken if there had been an out of command signal?

"A. I would have taken the same action if the vessel had shown out of command lights or no out of command lights." (Smith Appx. 31a).

In spite of recognizing the ominous potentialties of the situation, the Master of the tanker did nothing but continue to steer into the jaws of collision. Certainly there was a duty to maintain a careful lookout which would have readily disclosed the RIO to have been a motionless vessel. Implicit in this duty to keep such a lookout was the duty on the part of THE CABINS to take compass bearings of the RIO, and if that had been done, it would have been seen there was no question but that the RIO was without power, or drifting.

The note preceding Art. 17 of the Inland Rules (33 U. S. Code 201) provides as follows:

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the

compass bearing of an approaching vessel. If the bearing does no appreciably change, such risk should be deemed to exist."

And in speaking of this duty in *Marsden's Collisions At Sea,* 9th Ed. at page 352, the author states:

"The preliminary paragraph to the steering and sailing rules imposes a duty on the person in charge of a vessel to take compass bearings of the lights of other vessels as they come into view. A vessel will be held to blame for an omission to take bearings (when a collision might have been avoided, if the information, which observation of the bearings would have given, had been obtained.) (Citing The President Lincoln, 1911, p. 248). When the bearing of a light on a vessel ahead narrows, it indicates that she will cross ahead; when it broadens, that she will pass clear on the beam, if the course of neither vessel is altered."

In failing to rule there was a duty as a matter of law on the moving vessel to maintain a careful lookout, the lower court erred as a matter of law, and for this reason alone, a writ should be granted.

III The Court below based its decision upon a pivotal factual point not in any way supported by either the evidence, or the findings of fact of the District Court, while nevertheless affirming all of the findings of the District Court as to questions of fact.

In its *per curiam* opinion, the Lower Court stated as follows:

". . . THE CABINS proceeded at a reduced speed and as she drew within two ships' length of

the RIO MARCANA she noticed her swinging to the left and apparently directing her course across the path THE CABINS was taking. Thereupon the engines of THE CABINS were put in reverse in an effort to avoid a collision, but when it was seen to be inevitable the engines of THE CABINS were put full speed ahead with left rudder so as to lessen the impact of the blow, with the result that the bow of the RIO MARCANA struck the port side of THE CABINS . . . " Per Curiam Opinion, Appx. 56a).

In his opinion, Judge Hoffman expressly found the RIO's anchor was aweigh at 2055 or 2056 (10-11 minutes before collision), and that the vessel then swung to the north in approximately two or three minutes:

" . . . An appropriate estimate of the time when the anchor was aweight is 2055 or 2056."

"The RIO's pilot described the course of the vessel by stating that she 'spun around like a top' after the anchor was up. The head swung around to a NNE heading and commenced drifting towards the northwest. By reasons of its light draft, the heading from south to north was accomplished in approximately 2 to 3 minutes." (Appx. 43a).

It is readily apparent the swing was completed by 2058 or 2059 at the latest. The collision was at 2106. *Nowhere is there a finding of fact by Judge Hoffman that the swing was completed when the tanker was only two ships lengths distance.*

The finding of fact as to the time of the swing by the RIO is of the utmost importance as it follows there was a sufficient amount of time within which THE

CABINS could have taken evasive action and avoided the collision. THE CABINS, by the admissions of her own master, and as found by the District Court, had *eight minutes,* and not the time required to traverse two ship lengths distance, within which to take avoiding action in order to prevent collision with the drifting RIO, which was powerless to move.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Hugh S. Meredith
Braden Vandeventer, Jr.
Of Proctors for Petitioner
Compania Nacional de
Navegacao
Casteiro Patrimonio

March 27, 1961

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 853

COMPANIA NACIONAL DE NAVEGACION
CASTEIRO PATRIMONIO,

Petitioner,

v.

THE CABINS TANKER INDUSTRIES, INC.
Owner of the Steamship THE CABINS and
TERMINAL TANKER INDUSTRIES, INC.
Owner of the chartered Steamship [illegible],

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

HUGHES, MERRITT & BRADEN
VANDEVENTER, JR.
CITIZENS BANK BUILDING
NORFOLK 10, VA.

Counsel for Petitioner

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

COMPANIA NACIONAL DE NAVEGACAO CASTEIRO PATRIMONIO,

Petitioner,

v.

THE CABINS TANKER INDUSTRIES, INC., Owner of the Steamship THE CABINS and TERMINAL TANKER INDUSTRIES, INC., bareboat charterer, as it interest may appear,

Pespondents.

PETITION FOR WRIT OF CERTIERAI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURT CIRCUIT

DEPOSITIONS TAKEN AT RIO DE JANEIRO, OCTOBER 29, 1957

For Respondent Rio Captain Oswaldo Perez

Page (3) • • •

Direct Examination by Mr. Vandeventer

How lang have you been going to sea?

Captain Perez:

Approximately, for 37 years.

• • • • •

Page (4) * * *

By Mr. Vandeventer:

Q. On Noveber 16, 1956, which ship were you commanding, if any?

A. The M/V RIO MARACANA.

* * * *

Page (5) * * *

Q. Please give us her dimension.

A. Yes, she is 338'6" long, approximately 27' wide.

A. And how deep is she?

A. She is 23' deep.

Q. And how many cargo holds does she have?

A. She has 3 holds, and one reefer hold.

Q. And what is her tonnage?

A. She has 5,100 tons dead weight.

Q. What is her net tonnage?

A. Approximately 3,806 tons.

Q. here is her bridge super structure located?

A. On the aft end of the ship.

* * * *

Page (7) * * *

Q. To where was your vessel bound?

A. Norfolk, Virginia.

Q. For what purpose?

A. To receive 4,280 tons of coal for Angra dos Reis.

Q. Was the vessel loaded or was she empty?

A. She was empty.

Q. And how much was she drawing at that time?

A. 4' forward and 14' aft.

Q. Please describe the weather condition at 9:00 P.M.

A. We had good weather, good visibility, S.S.-west wind.

Q. And what was the visibility that night?

A. About 13 miles.

Q. What was the condition of the sea?

A. Good and smooth.

Q. What was the state of the tide?

A. The tide was growing.

Q. Do you mean to say the tide was flowing or ebbing?

A. It was flowing.

Q. What was the set of the tide?

A. At 320° in direction of the bay.

Q. In North-west direction?

A. Yes.

Q. And the velocity was about 1 knot?

A. One mile.

* * * *

Page (10) * * *

Q. Will you please describe and relate the circumstances? How did you enter the Cape and pick up the pilot?

A. When the ship arrived at Chesaapeake ay at 8:30 P.M. the engine stopped and tthe chief engineer advised me immediately. I at once thought that there was water in the oil and that this would be the reason for the sudden stoppage. At 8:35 I dropped anchor, and at 8:40, the port pilot, Mr. R. C. Frances, arrived on board, telling me that he could not stay there in view of the fact that this was a restricted area.

* * * *

Page (11) * * *

Q. Will you please mark on the chart the approximate area where you came to anchor?

A. About here, 55°, some 2½ miles from the lighthouse.

Q. Captain, will you please put your initials to this point? (Indicating the exact position on the Chart).

* * * *

Page (12) * * *

Q. Now Captain, after the pilot told you that you were in a restricted area, what did he then state?

A. "Captain, you cannot stay here, this a restricted adea". Furthermore he said: "You are in danger that the coast guard will come on board and give you a fine". The pilot then said: .let's lift the anchor. But I replied that I could not operate the ship because the engine was broken down. Then the pilot told me: "Don't worry, lift the anchor and let the tide carry the ship."

* * * *

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Q. Following this conversation with the pilot, what instructions did you give, if any?

A. After I had given orders to life the anchor and switch on the lamps, one green and one red — the side light — and on top two red lights at a distance of about 6' vertical, I believed everything to be in order.

Q. What for were these red lights you referred to?

A. These red lights were supposted to call attention to other ships that the RIO MARACANA was not under command.

Q. Where were these lamps hoisted?

A. On top of the bridge.

Q. On a halliard?

A. Yes, with a distance of 6' apart.

Q. Were they hoisted in a vertical or a horizonal position?

A. In a vertical position.

Q. And how far above the bridge super structure were they placed?

A. About 30 feet.

Q. Were these lights plainly visible all around?

A. Yes, they were.

Q. What was the size of the lanterns?

A. They have about 1 ft. in diameter.

Q. And what was the length of the lamp?

A. About 1½ to 2 feet.

Q. What type of filament?

A. I told the sailor to put on the red lamps and he put kerosene lamps; tthen I told him to put the electric lamps on.

Q. First you put in a kerosene lighting element?

A. Yes, I did.

Q. Why was an electric filament not put in immediately?

A. Simply because we had to call an electrican first and while calling him they put in a kerosene lamp.

Q. How long after the lamps were run up with kerosene did you put in an electric filament?

A. About two minutes later.

Q. And how long did it take you to replace the kerosene with the electric lamps?

A. About two minutes.

* * * *

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Q. At what time were the red lights run up initially?

At 8:43 P.M.

Q. What time did you heave the anchor?

A. At 8:40 P.M.

Q. After the anchor was heaved, did the heading of the vessel change?

A. Yes, it did.

* * * *

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Q. How did your vessel steady up? Approximately at about 20°? On what heading did she steady up?

A. Yes, at approximately 20°, for the wind was changing a lot. But due to this change of wind I cannot give the exact degree of the vessel.

Q. Approximately 20°?

A. Yes.

Q. Now after it steadied up, did she commence to drift?

A. Yes, the ship started to move with the current.

Q. In what direction did she commence?

A. In a direction of 320°.

Q. Now you have also stated that the lamps were changed at about 8:45 P.M., is that correct?

A. Yes.

Q. Now after the electric lamps had been run up on the hilliard, was either lamp brought down prior to collision?

A. No. At 9:43 P.M. they put the lights down.

Q. Was either light extinguished before the collision?

A. No.

Q. How far apart were the lamps placed?

A. I already stated it, about 6 ft. vertically.

Q. What other lamps, if any, were switched on after the anchor was heaved?

A. I already said, the side lights.

Q. Did you have any mast-head lamps burning?

A. No.

Q. Where are the halliards referred to located relative to the wheel house?

A. On top of the wheel house.

* * * *

FOR RESPONDENT RIO—MANUEL MACHADO CALDAS

Direct Examination by Mr. Vandeventer

Page (32) * * *

Q. Mr. Caldas, will you please give your full name and address?

A. Manoel Machado Caldas, Rua Tejupa, 438 Apt. 401, Penha, D. F.

Q. And what is your occupation?

A. Chief engineer.

* * * *

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Q. Did something out of the ordinary occur the night of November 10th?

A. I felt that the engines were slowing down.

Q. When?

A. At about 8:30 P.M.

Q. And what did you do, if anything?

A. When I felt that the machines stopped, I tried to find the trouble.

Q. And what did you do?

A. I started the engine and then the engine died and then I tried to find the reason for the sudden stoppage and found water mixed with oil.

* * * *

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Q. What time the repairs were finished?

A. At 9:43 P.M.

Q. Could they have been completed earlier?

A. No, I did my best.

Q. During the interval, when the repairs were made, would it have been physically possible for the ship to go on?

A. No, it would have been impossible.

Q. When did you join the vessel?

A. On October 29, 1956.

Q. At what port?

A. At Mobile, Alabama.

Q. Had your owners owned that ship prior to that date?

A. No.

Q. By whom was the new vessel delivered to the new owner?

A. By the American authorities.

Q. Do you know whether or not the vessel was overhauled before it was turned over to the new owner?

A. Yes.

Q. Where was that done, if you know?

A. In Mobile.

Q. Do you know where the first fuel oil was loaded on?

A. In Mobile, Ala.

Q. How many tons of oil did you take on?

A. 602 tons.

Q. How many tons were consumed en route to Norfolk?

A. 42 tons.

Q. How many fuel tanks did you use for that quantity?

A. Six fuel tanks.

Q. Prior to loading, did you sound the tanks?

A. Yes, I did.

Q. What did you find there?

A. I found them to be absolutely clean.

Q. How were they loaded?

A. From oil lighters.

Q. Did you experience any difficulty with your fuel en route to Norfolk?

A. No.

Q. Can you account for the presence of water in the fuel?

A. The water probably came with the fuel from the oil lighters, mixed with oil. The ship tanks have no outside connection.

FOR RESPONDENT RIO—ALDO DE ABREU

Direct Examination by Mr. Vandeventer

Page (44) • • •

Q. Would you state your full name and home address please?

A. Aldo de Abreu, Rua Felisberto de Menezes, 31, Apt. 208, Rio de Janeiro.

• • • • •

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Q. On what vessel were you serving, if any, on November 16, 1956?

A. On the RIO MARACANA.

Q. In what capacity?

A. As chief mate.

• • • • • •

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Q. After heaving anchor, what lights did you see burning on your ship?

A. Two red lights on the bridge and the 2 side lights.

Q. Did you see any other lights on your ship?

A. I saw some lights through the portholes on the vessel.

Q. Were the red lights well visible?

A. They are international and are well visible.

Q. Were they on the vertical line?

A. Yes.

Q. How far apart?

A. I know the regulations and I kno wthey were according, about 1.50 meters.

* * * *

FOR RESPONDENT RIO—JOSE FLORENTINO MACHADO

Direct Examination by Mr. Vandeventer

Page (58) * * *

Q. Would you tell us your full name and address?

A. Jose Florentino Machado, Rua Padre Champagnat, 513, Caxito, Recife, Pernambuco.

A. Sailor.

* * * *

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Q. In other words, you relieved the other at 9:00 P.M.?

A. Yes.

Q. Did you have any power o nthe rudder?

A. No.

* * * *

Re-Direct Examination

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Q. Do you know the meaning of "steerage way"?

A. No.

Q. Do you know if you can steer the vessel when the propeller do not turn over.

A. No.

Q. In other words, when the propeller is not turning over the rudder useless?

A. Yes.

Q. And on this particular night, when the engines were bad, it was impossible to steer the ship?

A. It was impossible.

FOR RESPONDENT RIO—ESTANISLAU LUIZ KLIEMCZAK

Direct Examination by Mr. Vandeventer

Page (64) * * *

Q. Will you please give us your full name and address?

A. Estanislau Luiz Kliemczak, Rua 8 do Decembro, 275, casa 1 house No. 1), Mangueira, D.F.

Q. What is your occupation?

A. Sailor.

* * * *

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Q. Do you recall heaving the anchor that night?

A. Yes.

Q. Would you please tell us what orders were given about that time, if any?

A. The Captain told me to switch on the red lights.

A. What time did you switch on the red lights?

A. At 8:40 P.M.

• • • •

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Q. How did you hang the red lights?

A. On a holliard.

Q. How many lights did you put on a halliard?

A. Two red lights.

Q. How far apart?

A. About 6 feet apart.

Q. Were they suspended on the halliard on the bridge?

A. Yes.

Q. Was that the same holliard where signs are on?

A. Yes.

Q. Were the lights plainly visible all around?

A. Yes.

Q. What type of filament did the lamps have?

A. First a kerosene filament and then the Captain gave orders to put them out and put the electric ones on.

Q. And you put them on?

A. Yes.

Q. At about what time did you change from kerosene to electric lights?

A. About 8:43 P.M.

Q. How long did it take to change the lights?

A. About three minutes.

Q. Were the red lights burning at the time of the collision?

A. Yes.

Q. Were the lights extinguished at any time before or after the collision?

A. No.

Q. Were the lights pulled down at any time before the collision after you had put the electric filament in until the time of collision?

A. No.

* * * *

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Q. Can you recall if the other ship sounded a whistle before or after the collision?

A. After.

Q. How many whistles did it sound?

A. I cannot remember.

* * * *

FOR RESPONDENT RIO—WALTER DE SA LEITAO

Direct Examination by Mr. Vandeventer

Page (71) * * *

Q. Will you give your full name and address please?

A. Walter de Sa Leitao, Rua Almirante Gomes Pereira, 21, Apt. 401, Rio de Janeiro, D.F.

* * * *

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Q. On what ship were you serving on November 16, 1956?

A. On the RIO MARACANA.

Q. In what capacity?

A. As second officer.

* * * *

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Q. At the time of collision, what lights were burning on your ship?

A. 2 red lights over the bridge and two side lights.

Q. Can you recall whether or not those two red lights over the bridge were taken down before the collision?

A. Yes, for the purpose of changing from kerosene to an electric filament.

Q. And what time did that occur?

A. At 8:42 or 8:43 P.M.

Q. And the lights were never taken down after that before the collision?

A. No.

WITNESSES AT TRAIL PROCEEDINGS FOR LIBELLANT THE CABINS—CHARLES H. REED

Direct Examination by Mr. Young

Page (21) * * *

Q. Captain, as your vessel passed buoy "2CB," was there any course change made?

A. Yes, sir. There was course change made.

Q. What was that course, if you recall?

A. From "2CB" on in we steered various courses in order to make approximately 312 true.

Q. Captain from buoy "2CB" until arrival time, is there any way you can estimate what speed you were making?

A. Well, I would estimate that we were making approximately fourteen and a half knots at that time.

Q. Is that full speed?

A. That is full sea speed, yes, sir.

• • • •

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A. The first reduction in speed was at 2048.

Q. What time is that?

A. That is 8:48 p.m., the time of arrival off Cape Henry.

• • • •

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Q. Captain, could you estimate, after you were on full ahead and maneuvering speed, after arrival, what speed THE CABINS was making approximately?

A. With about 70 revolutions, which is maneuvering full speed, would give us about twelve, about twelve knots an hour.

• • • •

Q. Would you generally describe in your own words what you say, and what happened as you approached Cape Henry after arrival.

A. Well, after arrival at 2048, I was looking for the "2A" buoy and the pilot boat and observed various navigational lights and various ship lights ahead of us at different times during that period.

Q. Do you recall what course you were steering at that time?

A. No, sir. As I say, we were steering various courses to make that 312 true.

Q. Go on, then.

A. As we approached the pilot station or buoy "2A", we approached closer to it, we could distinguish what appeared to be ship lights and we did finally pick up the buoy "2A."

Q. About what time was this, Captain?

A. Well, it was around 2050 that we could distinguish ship lights or lights on vessels.

* * * *

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Q. Would you describe the reason for this course change.

A. About 2057 we determined the lights on a vessel ahead of us as being the masthead range and side light of a vessel, masthead being to the lower and to the right, or to the left of the range light, and the red light being almost ahead of us. Then at that time the master ordered that the course be changed approximately four degrees or to the right, which was about

four degrees, in order to keep that vessel on our port hand.

• • • •

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Q. That is a period of about twenty minutes, from 2028, 2048, at 14-½ knots, is that correct?

A. Yes, sir.

Q. Did you take any bearings at that time, Captain?

A. No physical bearings other than visual bearings.

Q. Now, Captain, you stated that about arrival time you began to see lights up ahead. How far away were you from these lights that you thought you discerned up ahead at that time? Use your dividers.

A. Approximately three and six-tenths miles.

Q. Where were these lights located that you thought you saw?

A. Well, at the time of arrival there were some lights right ahead of us and there were some on the starboard bow and some on our port bow.

Q. Captain, what time did you say you were able to distinguish these lights?

A. Around 2055.

Q. And what did you distinguish at that time? Would you repeat that please.

A. Well, we could distinguish the buoy "2A." And we could distinguish a vessel ahead of us by the white lights, as well as there was a pilot vessel in view, too, on our port bow.

Q. How far away from them were at that time, Captain, when you could distinguish them?

A. It would be about around three miles or less.

Q. When you were first able to distinguish where this vessel was that was showing you its red light, could you locate that vessel as your best estimate of where it was?

A. You mean locate it at the moment where it apparently was?

Q. Yes.

A. I would say it was around in this area in here.

Q. Would you put a mark in that area, whatever you think you saw it.

(The witness marked on chart.)

Q. Circle that mark, please, Captain. Put your initials beside it and put an "A" in parentheses underneath it.

(The witness marked on chart.)

Q. That is where you estimate the vessel was when you first sighted it?

A. Apparently approximately where it was when we first sighted it, yes, sir.

* * * *

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Q. Captain, at 2101, when you reduced speed to dead slow, were you looking out the porthole ahead and could you discern what you have described yourself?

A. I had moments when I didn't look out of the porthole. But that was only at the time I was writing up the bell book and giving orders.

Q. Where did you expect to pick up the pilot, Captain?

A. Expected to pick up the pilot just off of "2A" buoy.

Q. Had you seen the pilot at 9:01, 2101?

A. Yes, sir, I think we had seen the pilot launch; around that time.

* * * *

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Q. Where was he located at that time?

A. The pilot launch at the time I saw him had just come under the stern of the vessel ahead of us and was approaching us on our starboard bow, between our bow and the buoy "2A."

* * * *

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Q. Captain, what was the angle of impact between THE CABINS and the RIO MARACANA?

A. Angle of impact was almost a 90-degree. She was almost a 90-degree to our amidship section.

* * * *

Cross Examination by Mr. Meredith

Page (67) * * *

Q. Going to your first testimony, which was Baltimore testimony, that was on 19th of November, three days after the collision, page 8 of that testimony. On that page you were asked to more or less tell in your own words what happened. The specific question was this:

"Would you describe the incidents just before, during, and just after the collision."

And you went on for several paragraphs. The particular paragraph that I am concerned with is the first paragraph, which I will read in its entirety.

"We had taken arrival at eighteen minutes till nine, at 2048, just to the south of "2A," abeam of Cape Henry light. Just a couple of minutes after that, we started reducing speed for the pilot station and as we approached the pilot station off of "2A" we noticed this vessel apparently working with the pilot boat. It appeared to me that he was working with the pilot boat, either discharging or taking on a pilot."

You recall that?

A. I recall making that statement, yes sir.

Q. And certainly your recollection of the events at that time was probably better than it is now, three days after the accident?

A. More than likely, yes, sir.

* * * *

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Q. Did you have a lookout stationed on this occasion?

A. Yes, sir.

Q. What was his name?

A. Name of Mr. Lovelace.

Q. Is he here?

A. Not to my knowledge, no, sir.

* * * *

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Q. What about the helmsman, who was he?
A. A man by the name of Reagan.

* * * *

Q. Is Mr. Reagan here?
A. No, sir, not to my knowledge.

* * * *

Re-direct Examination by Mr. Young

Page (97) * * *

Q. You were asked about a red light seen above the bridge, which you testified to observing at the Coast Guard hearing in Baltimore three days after the collision, and you stated that you saw that red light when you saw the red red and green side lights of the RIO MARACANA. Would you tell us again what time you saw the red and green side lights of the RIO MARACANA?

A. May I again have reference to the bell book? I would say we saw the red and green light on the RIO MARACANA at approximately 2101 or 2102.

* * * *

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Q. Could you estimate from approximately 2057 when you gave a half ahead to 2101, when you gave a dead slow ahead, what speed you averaged?

A. I would estimate we averaged a speed of approximately eight knots.

Q. And for the period from 2101 to 2104, while you were going dead slow ahead until you went half

astern, was it in your opinion any further reduction in speed and, if so, what is your estimate?

A. I would think there is a further reduction. I would estimate about six knots an hour on that.

Q. Have you stated an estimated speed of THE CABINS at the time of this collision? And, if not, what is your estimated speed?

A. Estimated speed at the time of the collision with the RIO MARCANA, forward motion would have been about two, three or four knots.

* * * *

William B. Smith, Witness for Libellant The Cabins

Direct Examination by Mr. Young

Page (143) * * *

Q. First appeared to you, your best estimate.

A. In this vicinity here.

Q. Would you put an "A" next to that and your initials. That indicates the RIO MARACANA's location when you first sighted her?

A. It does.

Q. Now, Captain, will you give your best estimate of the spot where the collision took place.

(The witness marked on chart.)

Q. Would you put a "B" next to that spot. And "B" indicates the point where the collision took place?

* * * *

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Q. Captain, I ask you to refer to Respondent's Exhibit No. 2, the engine bell book, and starting with the first bell, would you read them off down to the point where it says "anchored."

A. At 2053, half speed ahead; 2053-½, slow speed ahead; 2101, dead slo wahead; 2104-½, half speed astern; 2015, full speed astern; 2105-¼, full ahead.

Q. Hold it right there, Captain. Up untill that point who had executed your orders to the engine room on the telegraph?

A. The chief mate.

Q. That is up till the first full ahead bell at what time?

A. irst full ahead was 2105-¼.

Q. Read the next bell, Captain.

A. At 2106-½, full ahead.

* * * *

Cross-Examination by Mr. Meredith

Page (169) * * *

Q. At the time that you sighted her, 2050, did you pick up your binoculars to look to see what side lights, colored lights were showing at that time?

A. I did, due to the fact I was looking for buoy "2A," yes, sir.

Q. What did you see?

A. I saw those white lights and buoy "2A."

Q. Did you see any colored lights?

A: The only colored lights I saw were the buoy.

Q. You didn't see any colored lights on the RIO?

A. No, sir, I did not.

Q. Captain Smith, you testified on two occasions, did you not, before the Coast Guard?

A. I did, yes, sir.

* * * *

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Q. Now, Captain, you were asked at the Coast Guard hearing, which took place just four days after this occurrence, this question: This was in answer to the question that the Coast Guard always ask you. I am reading now from page 3.

> "Captain, will you describe now the incidents just before, during, and immediately after the casualty."

And you went on for several paragraphs. The particular paragraph that I am concerned with appears on page 4, next to the top.

> "The RIO MARACANA when at approximately angle of three points on our port bow started turning to the left, showing his red and green running lights, eventually showing his green light completely. I at that time had glasses in my hand looking at him and noticed a red light above his bridge deck house.
>
> "Question: Approximately how far was he from you when you first noticed his green light?
>
> "Answer: Approximately three-quarters of a mile. He swung around to a 90-degree angle and

started heading for our side. He then rammed us."

MR. SEAWELL: Port side.

MR. MEREDITH: I beg your pardon.

Q. "He then rammed it." Do you recall making that statement?

A. I do.

Q. And yet you say here today that the RIO was two ship lengths away from you at the time you first saw this extra red light, is that correct?

A. That is correct.

Q. Certainly your recollection at that time, four days after collision, was better than it is now some sixteen months later, isn't it?

A. It is, some thirteen months later, yes.

Q. Thirteen months later, excuse me: I mean your recollection at that time is boun dto have been better; isn't that correct?

A. That is correct.

* * * *

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Q. Captain, you were intending to pick up a pilot in the vicinity of "2A," is that correct?

A. That is correct.

Q. And you even stated, I believe, that after you altered course to 316 that that course would have carried you by buoy "2A" so that "2A" would have been one to two-tenths a mile away from you on your starboard hand?

A. I said close by, or one or two-tenths miles, yes, sir.

Q. Can you step down here, if you would, and draw on this chart that projected course of 316 that would have carried you with reference to the buoy in the manner that you have described.

* * * *

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Q. (By Mr. Meredith) You were making good 312, is that correct?

A. I don't know whether I was making that good or not.

Q. Why did you draw it on the chart?

A. I was trying to make it good.

Q. So, to the best of your knowledge, that is the course that you made good?

A. In other words, I have to go by something there; some course line.

Q. That is, to the best of your recollection, 312 is the course that you made good?

A. Yes, to the best of my recollection; yes, sir.

* * * *

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Q. I hand to you Respondent's Exhibit 1 and call your attention to the 8:44 entry which reads: "Altered left to mean heading of 311. Held this heading until 8:52.

"8:52: Altered right to 312. Held this heading until 8:54:"

That would indicate you were steering either 311 or 312 or making good that, wouldn't it. To refresh your

memory I will read you this, again now reading from page 6 of your Coast Guard testimony at Baltimore, four days after the collision:

"Question: Will you tell us the courses you were proceeding on entering Chesapeake Bay.

"Answer: I was proceeding on course 312 degrees true and when I picked up the RIO MARACANÀ ahead I altered course to 316 degrees true, putting his stern on my port bow."

You recall that?

A. Yes.

* * * *

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Q. (By Mr. Meredith) Captain, after you altered course to 316 or thereabouts, did you notice the bearing of the RIO from your vessel?

A. Yes, I did.

Q. After you altered course to 316, the RIO was then on your port bow? Correct?

A. Yes, sir.

Q. How far on the port bow was she? Was she one point, two points, three points, four points, or how far?

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Q. I am trying to find out the causes of this collision, Captain.

A. Yes, sir, I understand that.

Q. And you have given me a set of facts in which it is impossible for me to see how a collision could have

occurred unless the RIO was underway and headed toward you. And actually came into your side with way upon her, is that correct, according to your version of this?

A. Yes.

* * * *

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Q. Do you have either the chief engineer or the engineer on watch here at this trial?

A. No, sir, we do not.

Q. According to the course recorder, Respondent's Exhibit 1 and 1-A, would you tell me at what time the left swing is reported? Maybe you had better read again the entry from 9:01.

A. "9:01: Altered right to 338 and on this heading at 9:03. This heading was held for a better part of one minute and then the vessel commenced swing to left at about 9:03. This left swing continued through 270 degrees."

Q. Stop right there. Assuming that your times there are correct, that would indicate, would it not, Captain, that you were swinging left for three minutes prior to the collision? Of course, assuming again that the recorder synchronized.

A. That would indicate it, yes. That is quite clearly. This would indicate it.

* * * *

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Q. According to th , then, you would have been on that left swing for th minutes; isn't that correct?

A. According to this, yes, sir.

Q. And that could have accounted for the collision, couldn't it, Captain?

A. Yes, if I'd have done that, it could have.

* * * *

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Q. Captain, what, if anything, did that red light mean to you when you saw it? That extra red light which you saw at 2104, you say.

A. Well, it didn't mean anything particularly to me but when I saw his green light, then I knew something was wrong.

Q. Did it occur to you that the vessel might be out of command?

A. Not until he showed the green light, no, sir.

Q. At the time he showed you the green and then you noticed the extra red up above the green, did it occur to you at that time that the vessel might be out of command?

A. No, sir, it did not.

Q. I am going to read to you something that was said in Baltimore four days after the collision, according to this record, by you. I am reading from page 6.

"Question: When you first saw the green light alone and the single red light, did you give any thought to the question as to whether the vessel was out of command or not?

"Answer: Yes, I did. That was another reason for putting the engines full astern.

"Question: Is that the saame action you would have taken if there actually had been an out of command signal?

"Answer: I would have taken the same action if the vessel had shown out of command lights or no out of command lights."

You recall making that statement?

A. I do.

Q. And your recollection at that time was certainly better than it is now?

A. Yes.

Q. Captain, as you were approaching buoy "2A," you have previously stated on direct examination that you had observed this pilot launch on your port bow and it was crossing over to your starboard bow, is that correct?

A. That is correct.

Q. So that at some time or other she would have had to cross your bow, is that correct?

A. The pilot launch, yes, sir.

Q. Weren't you concerned about the safety of the people in that pilot launch and the possibility of colliecting with it?

A. Yes, sir, I was.

Q. And your attention was directed primarily to an observation of that launch at this time, wasn't it?

A. It was directed to the launch and the buoy and the RIO MARACANA, all three of them, yes, sir.

Q. But everything that you did with your en-

gines up until the full astern bell, according to the engine room at 2105, had been done preparatory to taking on your pilot?

A. Up to half astern, yeys, sir. Up to half astern.

Q. The half astern had to do with the RIO also?

A. Yes, sir.

* * * *

Page (194) * * *

Q. You can certainly stop quicker with an emergency astern, emergency full speed astern bell, than you can with half astern bell; isn't that correct?

A. Yes, sir, that is correct.

* * * *

Page (197) * * *

Q. Can you give me an estimate of the speed of your vessel over the ground at the time that you gave the half astern?

A. Approximately six knots.

Q. Captain, what way did your vessel have at the moment of impact?

A. In regards to speed?

Q. Yes.

A. Approximately four knots.

Q. And what speed, if any, did the RIO MARACANA appear to have?

A. I can't answer that. Of course I don't know.

Q. Did she have any evidence of speed? Was there any bow wave?

A. I didn't notice any bow wave.

Q. And you noticed nothing that would give you any indication of forward motion on the part of RIO MARACANA, did you?

A. Not at the time of the collision.

Q. My other reference was on page 4, to this question of the three-quarter of a mile, page 4 of the Baltimore testimony given on November 20th, 1956. And I'd like to read it into the record.

"Question: How many points did you estimate he was on your port bow?

"Answer: He was approximately three points on our port bow.

"Question: And approximately three quarters of a mile away?

"Answer: Yes, sir."

Do you recall making that statement?

A. I do.

Q. And that was your best estimate at the time of the distance he was from you at the time he showed you the green? The best estimate at that time, Captain, not now. At that time.

A. It must have been; it is in the Coast Guard hearing.

* * * *

Page (205) * * *

Q. Captain, did you have a lookout during the ten or fifteen minutes preceding this collision?

A. Yes, there was a lookout on the bow.

* * * *

Page (205) * * *

Q. The lookout is not here today?

A. No, sir, he is not.

Robert C. Francis, Recalled Witness for Respondent Rio

Direct Examination by Mr. Meredith:

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Q. And how long have you been a pilot with the Virginia Pilots Association?

A. Forty-five years.

Q. Do you recall going aboard the RIO MARACANA on this particular night?

A. I do.

Q. The night being November 16, 1956. Approximately what time did you go aboard?

A. About 8:40.

Q. What was the condition of tthe RIO at that time? Was she underway?

A. I found her anchored when I got to the bridge. She had anchored just a few minutes before I got aboard.

Q. What lights was she showing at that time?

A. Anchorage lights.

Q. And did you give any instructions to the master of the RIO MARACANA with reference to being anchored where he was?

A. Yes, I told him that he was anchored in a

restricted area and advised him to heave his anchor and we would drift out of there because the wind was southeast and a flood tide, and there was no other ships in sight or near us to bother us, so I advised him to heave his anchor and we would drift with the tide until such time as the engines were ready.

Q. Did you give him any instructions as to what lights he should show?

A. I told him to hoist two red lights in a vertical line over the bridge.

Q. And thereafter what, if anything, was done with the anchor?

A. Anchor was heaved up about ten minutes and we put two red lights over the bridge, running lights, I know the side lights were burning, but I assume the range lights and the masthead light were burning. I didn't check those.

Q. That ten minutes would have been figured from what time?

A. From about 8:40.

Q. Ten minutes from 8:40, or 8:50?

A. Eight-fifty.

Q. And that would be the time that the anchor was aweigh?

A. Anchor was aweigh.

Q. What does "anchor being aweigh" mean, Captain?

A. It's off the bottom. It doesn't necessarily mean it is up but it is off the bottom.

Q. And first, would you tell me how the RIO MARACANA was headed. In what compass direction was she headed when you first boarded her?

A. She was headed about southeast when I first boarded her.

Q. And at the time the anchor was aweigh what was she headed?

A. She was probably a little east of southeast because she was — Heaving an anchor, a ship will sheer about sometime, particularly a light steamer; wind get on the bow and sheer her one way or another and she was probably a little eastward or southeastward heading.

Q. What did she then do after the anchor was aweigh?

A. Well, she spun around like a top because she was drawing no water forward, about two feet, and about ten or twelve feet aft, and svun around like a top. The wind blew her around.

Q. After the wind had blown her around, in what general heading was she?

A. She was about northeast, north-northwest.

Q. Did she steady up in that general position?

A. In that general position.

Q. What was the condition or the state of the tide at this time?

A. It was last of the flood tide.

Q. And what direction, if any, was that setting the RIO MARACANA?

A. About northwest.

Q. And at what direction was the wind as you recall it?

A. About southeast.

Q. And what effect, if any, would the wind have on the set or the drift of the RIO MARACANA after her anchor was aweigh?

A. Set her to the northwardly direction.

Q. The combined set of the wind and the tide, in what general direction was the RIO MARACANA drifting?

A. To the northward, north-northwest.

Q. North-northwest?

A. Yes.

Q. Can you give me an estimate of approximately how long it took the RIO MARACANA to swing around till she was headed in a northerly direction after the anchor was aweigh?

A. A couple of minutes, I would say.

Q. A couple of minutes?

A. Yes.

Q. And from that time until the time of collision, what was the general heading of the RIO MARACANA?

A. Northerly.

Q. What was the state of the engines aboard the RIO MARACANA?

A. When I got aboard they told me the engines were broke down; they had water in their oil and that they couldn't move the engines, that that would be corrected in a few minutes.

Q. And at any time before the collision were the engines in use aboard the RIO MARACANA?

A. No. In fact the telegraph was never touched, I don't think.

Q. Now, when the anchor was aweigh what, if any, lights were exhibited on the RIO MARACANA?

A. Well, the anchor lights, she had anchor lights. They were put out and the regulation side lights and the two red lights over the bridge were turned on and I assume the range lights and the masthead lights but I did not observe those.

Q. Did you observe the two red lights?

A. Yes. In fact I helped to light one of them.

Q. Would you describe to the Court how they were located, how they were rigged.

A. Well, they were rigged one over the other, one being about six feet apart over the bridge, over the deck house of the bridge, on the bridge.

Q. One over the other with about six feet between them?

A. Between them. And the lower one, I would say, was about 15 feet above the bridge.

Q. So that would have made the upper one about 21 feet?

A. Above the bridge.

Q. Could they be seen by other vessels from that position?

A. They should have been because they showed all around the horizon.

* * * *

MEMORANDUM OF DISTRICT COURT

In cross-libels we are called upon to determine the responsibility for a collision between THE CABINS, hereinafter referred to as 'CABINS", and the RIO MARACANA, hereinafter referred to as "RIO", which occurred in the general vicinity of the Maryland Pilot Boat at approximately 2106 on November 16, 1956, when off the Cape Henry light.

The CABINS is a C-2 type tanker of 10,172 gross and 6,134 net tons. She is 523.6' in length, 62.8' in breadth, 30.2' in depth, and at all times pertinent had a mean draft of approximately 30', being loaded with a cargo of gasoline and heating oil.

The RIO is a dry cargo carrier of Brazilian registry, sometimes referred to as a C1-M-AVI type vessel, of 5,100 gross and 3,806 net tons. She is 338.5' in length, 27' in breadth, 23' in depth, and at all times pertinent had a draft of 4' forward and 14' aft, being light with no cargo in her holds.

Vessels approaching the point of collision are, in most instances, required to stop or slow down for the purpose of taking on or discharging pilots. Those vessels going to, or coming from, Baltimore approach the Maryland Pilot Boat. Ships going to, or coming from the Port of Hampton Roads, including Norfolk, Portsmouth, South Norfolk, Newport News, Yorktown and Richmond, approach the Virginia Pilot Boat. At each Pilot Station there are qualified pilots, experienced with Inland waters, who take over the particular vessels and pilot same. The vessel and its owners nevertheless remain liable for the acts of the pilot boarding same.

On the night in question, with weather clear, sea smooth, visibility good, a slight current, and the wind approximately SSE at a velocity of 10-12 miles per hour, the RIO was inbound through the Virginia Capes en route to Hampton Roads. After departing the sea buoy ("2CB") off Cape Henry (she directed her course in the direction of the Virginia Pilot Boat to pick up her pilot as required by law. Just prior to reaching the rendezvous point for the pilot, the RIO experienced difficulty with the engines due to water in the fuel. The vessel anchored at approximately 2035. A few minutes later the pilot came aboard and, after some discussion, advised the RIO'S master that the vessel was anchored in an area designated as restricted by the United States Coast Guard, and that the vessel would be subjected to a penalty unless moved from its then location. Acting under the pilot's orders the anchor was heaved, and the vessel drifted on the tide and wind from her southeasterly heading, to her left in a semi-circle to a general northerly heading away from the restricted area and directly toward the path of the CABINS.

We entertain no difficulty in condemning the navigation of the RIO. The decision to raise her anchor at a time and place which, to the knowledge of her pilot, would undoubtedly permit the RIO to drift into the path of an oncoming vessel is, without more, sufficient to convict her of improper navigation. Indeed, one need only look to the testimony of the RIO's pilot to denote the manifest errors committed. Before leaving the pilot boat, he knew that the CABINS would be approaching buoy "2A" to pick up a Maryland pilot. After boarding the RIO he could see all of the CABIN's regulation lights at a distance of 2½ to 3

miles. THE CABINS made no appreciable change in her course approaching the pilot boat. The pilot was likewise aware of the fact that the RIO, if permitted to drift, would cross the intended path of the CABINS. His only defense is that he was advised, according to his testimony, that the engines would be started in five minutes, whereas, in fact, they were not in operating condition until 214v—approximately 48 minutes after the RIO weighed anchor and started to drift. True, the pilot was confronted with a language barrier as he was only able to communicate with the RIO's master through the second officer who spoke English "after a fashion", but this is all the more reason why the pilot should have exercised caution in giving orders. That confusion existed cannot be doubted when we note that the RIO's master claimed that he told the pilot that the engines would not be ready for 30 minutes and the second mate informed the pilot that the time would be from 15 to 20 minutes. With full appreciation of the necessity of avoiding a penalty for anchoring in a restricted area, it was, at best, a foolhardy act to permit an out-of-command vessel to be subjected to such a danger when, in fact, the penalty could have been enforced in any event as the anchor was already down. The pilot admits that if there had been other vessels nearby, he would not have permitted the RIO to drift. In short, he was willing to take a change with one approaching vessel, but not with more than one.

Aside from any discussion of out-of-command lights, no flares, blinkers or whistles were used by the RIO in an effort to warn the Cabins of any impeding danger. The pilot attempted to blow a whistle approximately four minutes prior to the collision but, due

to engine difficulties, the whistle was inoperable. He made no effort to ascertain whether there were other available whistle controls or signal lights until after the collision, at which time he learned that there were manual controls overhead which were readily operable, and a Morse light was equally handy. He did not ask whether there were flares aboard, and brushes off this inquiry by stating that he has assumed that there would be no need for same. There was insufficient time, according to the witness, to effectively use the blinker or searchlight, although it undoubtedly could have been put in use if caution had been exercised in sufficient time as the pilot frankly admits.

As the RIO made no notiation of times, other than when the pilot boarded the vessel at 2040 and the engines again commenced to function at 2143, it is difficult to fix the pertinent times as related to her activities. Certainly it cannot be seriously urged that the anchor was aweigh at 2043 as testified to by the master, chief mate, and others. It is a fair assumption that, with the language barrier existing, a few minutes were spent in conversation and, according to the pilot and second mate, it was a matter of 8 or 9 minutes after they commenced heaving before the anchor was aweigh. An appropriate estimate of the time when the anchor was aweigh is 2055 or 2056.

The RIO's pilot described the course of the vessel by stating that she "spun around like a top" after the anchor was up. The head swung around to a NNE heading, and commenced drifting towards the northwest. By reason of its light draft, the heading from south to north was accomplished in approximately 2 to 3 minutes. The RIO's chief officer was almost im-

mediately aware of the danger as he stated that, after receiving orders to heave the anchor:

> "Then I saw the other ship coming in our direction. Three times I told the captain that a collision would soon occur and finally it happened."

Whether this warning, given in a foreign tongue, was communicated to the pilot is unknown, but it is a clear indication of negligence on the part of the officer personnel.

A sharp conflict exists with respect to the RIO's lights. When the pilot boarded the vessel at approximately 2040, the anchor lights were displayed. The time required to put the so-called "out-of-command" lights in place, as described by the RIO's witnesses, is incredibly short. Initially, according to the witnesses, red kerosene lanterns were raised. Such lights are not, of course, a part of the vessel's fixed lights. They were taken to a halyard above the bridge, attached to the halyard, lighted, and then hauled approximately 15 or 30 feet above the bridge. The pilot even assisted in lighting one of the lights — a menial task for one charged with the safety of the vessel.

Three minutes after the red kerosene lanterns were in place, the RIO's master ordered that the kerosene lanterns be replaced with electric elements, thus requiring the services of an electrican who was not a part of the bridge complement. The time required for these procedures would not indicate that the anchor was aweigh at 2043, or at any time reasonably close thereto.

With her full running lights displayed indicating that she was "under way" and, according to the RIO's witnesses, with two red lights prominently exhibited re-

vealing an "out-of-command" vessel, the vessel drifted with the wind and tide and with no further warning until the collision at approximately 2106. The CABINS' master admitted having seen one red light above the RIO's bridge deck house at approximately the same time he observed the green starboard running light which was at or about 2058. The CABINS' chief officer indicated that he had initially seen a single red light that showed up momentarily over the RIO's bridge, but that it thereafter disappeared. The testimony of the CABINS' master is somewhat evasive and contradictory as to what he then did upon seeing the red light and green light. On direct examination he states that this occurred at 2104, only two minutes prior to the collision, whereas he had previously stated at the Coast Guard hearing that he noted the green and red lights at approximately 2058, about eight minutes before the collision. The later estimate of time appears to be more worthy of belief. It was at approximately 2058 that the CABINS altered her course right to 316° and settled on a heading of 315°, which course she continued to hold until 2103 when she again altered right to 318° and continued on this heading until 2105. At approximately 2015 the full astern bell was given and the CABINS blew a danger signal. This movement caused the bow of the vessel to pull to the right and the stern to fall off slightly to the left. Immediately thereafter the master, in an effort to take the brunt of the blow off the bow of the CABINS, ordered full ahead with a sharp swing to the left which continued on through 270°, and on which the CABINS was approximately 2110 some four minutes after the collision.

Obviously the master of the CABINS was initially confused when he first saw the green and red lights at 2058 at which time the RIO was in the process of swinging to the north. According to the RIO's testimony the running lights were turned on at or immediately prior to the time that the anchor was aweigh at approximately 2055 which, if correct, constituted a violation of Art. 2 of the Inland Rules, 33 U. S. C. §172, although, in this case, such a violation would only tend to confuse those aboard the CABINS and could hardly be deemed a proximate cause of the collision. Such confusion may, however, tend to explain the action or inaction of the CABINS as her master indicated that he would not have done otherwise even if aware of the fact that the RIO was out-of-command.

The authorities are not clear as to the status of lights to be displayed on vessels in Inland waters when drifting and out-of-command. Rule 4 (a) of the Internatinnal Rules, 33 U. S.C. §145 (b), provides that a vessel which is not under command shall carry, where they can best be seen, and if a power-driven vessel, in lieu of the lights required by rule 2 (a) (i) and (ii), two red lights in a vertical line one over the other not less than 6 feet apart, and of such a character as to be visible all round the horizon at a distance of at least 2 miles." The evidence substantially confirms that, in addition to the side lights, the RIO's range and masthead lights were likewise burning at or about the time the anchor was aweigh, and at all times thereafter until the collision. While proctors for the RIO have endeavored to establish aa custom indicating that, in Inland Waters, vessels out-of-command will display all running lights, including her masthead and range

lights, as well as two vertical red lights, the evidence falls far short of substantiating the existence of such a custom. *Griffin on Collision,* 1949 Ed., §253; p. 572. The Inland Rules contan no provisions for out-of-command lights. The Pilot Rules, promulgated by the Coast Guard under the authority granted by 33 U. S.C. §157, make certain specific provisions for the use of red lights in a vertical position, under varying circum stances[1] not her pertinent. Confusion is compounded when supposedly capable pilots experienced with Inland and Pilot Rules apparently dot not know what full running, masthead and range lights actually signify when vertical red lights also appear. If the RIO had attempted to comply with International Rule 4 (a), it is clear that the masthead lights were allegedly placed in a vertical line one over the other. It is little wonder that the personnel of the CABINS was unable to ascertain that status of he RIO as an out-of-command vessel until it was too late. Especially is this true when only one red light was observed. Nevertheless, the experienced pilot on the RIO, with full knowledge of the fact that Inland and Pilot Rules make no provision for two red lights signifying that the vessel was out-of-command, permitted the RIO to drift with lights were bound to confuse even the most experienced mariner. Such a situation calls for the application of Art 1 of the Inland Rules which states:

> "The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights shall be exhibited."

[1]If, as the RIO's pilot contends, two red lights indicate a vessel not under command, what do the various sec-

tions of the Pilot Rules mean to mariner in Inland Waters?

Moreover, there is a serious question as to whether the RIO hoisted two red lights in a proper position. The Maryland pilot boarded the CABINS at 2108, immediately after the collision, althought he did not actually see the impact as he was in a launch near the starboard bow of the CABINS. He did, however, hear the sound of the collision. Upon reaching the port wing of the bridge, the Maryland pilot noted that the RIO was either raising or lowering her two red lights. Just prior thereto it was observed that the two red lights were off at an angle, with the power light more to the starboard and one light very dim. The same pilot likewise saw the masthead and range lights on the RIO. The CABINS' chief officer testifled to the safe effect and her master stated that, after the collision, he saw two red lights in a horizontal position above the bridge house, and thereafter saw these same lights hoisted to a vertical position. or what purpose the RIO was changing her red lights is unknown, but it is a proper inference to be drawn from this testimony that, subsequent to the collision, the RIO became cognizant of the fact that the red lights had not been properly located as to visibility. The Maryland pilot likewise accounts for the swing of the CABINS to the left, as her starboard anchor was down when he reached the bridge and this caused the vessel to veer to port to the extent that, after the swing stopped, the CABINS was headed in the general direction of the Cape Henry lighthouse. The testimony of the Maryland pilot is of

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(1) Pilot Rules for Inland Waters—§ §80.18(b), 80-19(b), 20.20(b), 80.21(b), 80.22(b) (c), 80.23, 80.33(d), 80.33(e).

particular significance as he was not involved in the collision and he appeared to be a totally disinterested witness. He further stated that he had never before observed a drifting vessel with two red lights in Inland Waters.

We must remember that in the area of buoy "2A" it is not unusual for vessels to pass within two ships' length of each other. There is a maneuvering radius of approximately one-half mile within which the pilots board the vessels. Assuming, as we must, that the situation calls for the application of Art 27 of the Inland Rules relating to special circumstances, the obligation imposed on each vessel was due regard for all dangers of navigation and collision. With the confusing situation created by improper lights, the CABINS could not readily ascertain what the RIO was doing or intended to do. Any warning signal or whistle from the RIO would have perhaps imposed upon the CABINS the duty of going full astern at an earlier time, or in some other manner altering her course to avoid the collision, but, under the circumstances presented, if any fault existed on the part of the CABINS, it would clearly fall within the major-minor fault rule and the liability would remain with the RIO in any event.

The speed of the CABINS was gradually reduced from the time of her arrival at Cape Henry at approximately 2048 when she reduced to maneuvering speed, 70 RPM, 12 knots, until the point of collision. At 2057 and 2058 her speed was reduced to half ahead and slow ahead respectively. At 2101 she went to the dead slow ahead. All of these decelerations in speed were made in anticipation of taking on the pilot. Approximately two minutes prior to the collision the CABINS

went half astern in the belief that there was then some impending danger. At 2105, she was ordered full astern with the realization that a collision was imminent. It is argued that the CABINS should have gone full astern at 2104 or prior thereton, but again we are dealing with a condition involving maneuvers around a pilot boat with the RIO carrying, at best, confusing lights which quite probably indicate to the CABINS that the RIO was under full command.

While the angle of the impact was nearly 90° with the bow of the RIO striking between the No. 3 and No. 4 tanks of the CABINS just forward of the amidships section on the port side, the blow was not severe and, with the CABINS' movement of hard left, the damage was not too extensive as it resulted in a scraping or brushing action.

The main force of the RIO's argument lies in the course recorder from the CABINS. By the interpretationsm obtained from the readings by experts, the RIO hopes to invite a division of damage. That the times shown on the course recorder were generally slower than the CABINS' bridge times is not in serious dispute. The question remains as to how much slower. The Court is fully aware of the value of mechanical equipment such as a course recorder, which is not subject to the discrepancies found in the words of live witnesses. It is, however, important to correlate the times and actions shown on the course recorder with the physical facts and other times revealed by the vessel. It seems clear that the course recorder was at least two minutes slower than bridge time as, for example, the course recorder reflects that at 2025 the vessel, altered rather sharply to her left from a heading of 330° to a

mean heading of 314°. This is at the time the vessel passed buoy "2CB" and the ship's time indicates that this alteration took place at 2028. Again at 2057-2058 ship's time, an alteration of 3° to 4° to the right is shown, whereas the course recorder reports changes as follows:

2052—altered rights from 311° to 312° and on this heading until 2054.

2054—altered rights to 313° and on this heading until 2056.

2056—altered right to 316° and settled on heading 315° until 2101.

Comparing these times and course changes, bearing in mind that the course recorder demonstrates the actual courses of the vessel and not the compass changes, the conclusion is inescapable that the course recorder was from 2 to 2½ minutes slower than ship's time.

This factor is of importance as the RIO contends that the CABINS swung to port at 2103 (course recorder time), thereby causing the impact. The interpretation of the course recorder indicates that the CABINS "commenced swing to left at *about* 9:03", but that *at* 2103 the vessel was heading 338°, having altered to 338° at 2101. The CABINS contends that the full speed astern action was at 2105, causing the stern of the vessel to veer to the left, and that at 2105-¼ the full ahead and hard left rudder order was given. Considering the physical facts and apparent variations in times, the Court accepts the version of the collision as advanced by the CABINS.

While it appears that the CABINS blew a danger signal at approximately 2105, we think that this is of

little moment as the RIO was out-of-command in any event. This fact does tend to show that those aboard the CABINS were not aware of the status of the RIO until seconds prior to the impact. Had the CABINS blown other signals prior thereto, the result would not have been different.

The argument is advanced that the engineer of the CABINS was not produced as a witness. Proctors had stipulated that the engine bell book could be produced without further proof. While there are some conflcts between the times shown on the engine bell book and those reflected on the deck bell book, with respect to changes in speed, the presence of the engineer on duty in the engine room would not have materially altered the factual situation as to times deemed pertinent. There were rather substantial variations prior to 2101 but,as of that time, the respective books reveal:

Deck Bell Book—Blc	..Engine Bell Book—Blc .....
2101—Dead slow ahead	2101—Dead slow ahead
2104—Half astern	2104½—Half astern
2105—Full astern	2105—Full astern
2106½—Full ahead	2105¼—Full ahead
2106—	2106½—Full ahead
2106½—Stop	2106½—Stop
2108—Dropped anchor	Anchored

Assuming arguendo, that the engineer on duty was better able to note the times and make the entries than the chief officer of the CABINS, to adopt the times and engine movements as recorded in the engine bell book would not change the result.

Nor do we think it significant that the CABINS did not produce the helmsman or lookout, although it

should be noted that efforts were made to have the lookout present. The helmsman could add little, if anything, to what we already know from the course recorder which, as indicated, is far more valuable than the testimony of a witness speaking from memory. As to the lookout, it is possible that he may have observed two red lights on the RIO, but certainly a lookout is not ordinarily required to interpret lights. His function is, in the main, to direct lights to the attention of the officer personnel. We do not believe that any interference adverse to the CABINS should be drawn in this case by reason of the failure to call as witnesses the lookout, helmsmen, chief engineer, or engineer on watch:

We find it unnecessary to determine whether a drifting vessel, such as the RIO, is "underway" within the meaning of Art 2 of the Inland Rules, 33 U. S. C. §172. Under the provisions of Art 1 of the Inland Rules, it is stated that a vessel is "underway" within the meaning of the rules, when she is not at anchor, or made fast to the shore, or aground. The memorandum has been prepared upon the assumption that the RIO was "underway." The RIO's witness obviously concluded that, in the absence of a specific rule governing out-of-command vessels in Inland Waters, the International Rules would apply. Rule 4(d) of the International Rules relating to out-of-command vessels is as follows:

> "The vessels and seaplanes referred to in this Rule, when not making way through the water, shall not carry the coloured sidelights, but when making way they shall carry them."

Whether the words "under way" and "making way" are synonymous is not decided. It is clear, however,

that if Rule 4(d) aforesaid is applicable, the RIO committed an additional violation tending to confuse the CABINS.

There is reputable authority to the effect that a drifting vessel out-of-command is not required, under Inland Rules, to display two red lights in accordance with Rule 4(a) of the International Rules and, indeed, the showing of such red lights would be a violation of Art. 1 of the Inland Rules. *The Socony No.* 115, 2, Cir., 63 F. (2d) 226. While in the cited case the vessel not displaying two red lights was exonerated, there is abundant evidence of fault on the part of the RIO under the facts here presented to determine liability irrespective of the condition of the lights.

A decree will be entered adjudging the RIO solely liable for the damages occasioned by the collision of November 16, 1956. In lieu of specific findings of fact and conclusions of law, this memorandum will be adopted in accordance with General Admiralty Rule 46½.

Present decree after notice.

(SGD) Walter E. Hoffman
United States District Judge

Norfolk, Virginia
March 8, 1960.

DISTRICT COURT
INTERLOCUTORY DECREE

The above entitled cause having come on for final hearing on the pleadings and proofs of the respective parties, and having been argued by the respective proctors, and the Court, after due deliberation, having handed down its opinion in writing holding that the collision referred to in the pleadings was due sosely to the fault of the M/V RIO MARACANA, and directing a decree for the libellants and cross-respondents herein,

Now, on motion of Clerk, Ladner, Fortenbaugh & Young and Seawell, McCoy, Winston and Dalton, proctors for the libellants herein, it is

ORDERED that the opinion of the Court, heretofore file herein on the 8th day of March, 1960, be and hereby is adopted as the Court's findings of fact and conclusions of law, pursuant to Supreme Court Rule 46½, and it is further

ORDERED, ADJUDGED and DECREED that the libellants herein recover of and from the M/V RIO MARACANA, her owner, Compania Nacional de Navegacao Casteiro Patrimonio and Indemnity Insurance Company of North America, the damages sustained by them in consequence of the matters referred to in the libel, together with interest from November 16, 1956 until paid and costs, and dismissing the cross libel, and it is further

ORDERED that if the proctors for the respective parties cannot agree as to the extent of libellants' damages herein within four weeks from the date of this decree, the question of libellants' damages may be re-

ferred to a Commission to hear proofs and report to this Court his conclusions thereon, and upon appropriate motion for the appointment of a Commissioner duly made

(SGD) Dalter E. Hoffman
United States District Judge

Norfolk, Virginia
April 5, 1960.

PER CURIAM:

The subject matter of this suit is a collision between a tanker and a dry cargo carrier about 9:00 P. M. on the evening of November 16, 1956, off the Cape Henry light near the port of Hampton Roads in the southerly approach to the Chesapeake Bay in Virginia. Cross-libels were filed in which each vessel charged that the collision was caused solely by the negligent operation of the other. The district judge found the dry cargo ship to blame, entered a decree in favor of the tanker, and dismissed the cross-libel in an opinion in which the facts and the respective liabilities of the parties are carefully set out. See 185 F.Supp. 11.

On this appeal it is conceded that the dry cargo ship was at fault and the only question is whether negligence of the tanker contributed to the catastrophe. As appears from the judge's opinion, THE CABINS is a tanker of 10,172 gross tons, 523.06 feet in length. On this occasion she carried a cargo of gasoline and heating oil. The RIO MARACANA is a dry cargo carrier of 5,100 gross tons burdened and 338.5 feet in length. On the night of November 16th she had no cargo in her holds. Shortly before the collision oc-

curred both vessels approached the much traveled area near the entrance to the bay where the Maryland pilot boat for the accommodation of vessels going to and from Baltimore and the Virginia pilot boat for the accommodation of vessels going to and from nearby Virginia ports are stationed. The RIO MARACANA, inbound for Hampton Roads, came in first. She directed her course after passing buoy 2-CB off Cape Henry toward the Virginia pilot boat at buoy 2-A several miles to the northwest but before she reached the rendezvous wit hthe pilot she was obliged to drop anchor southwest of buoy 2-A in a forbidden area because of difficulties with her engines. Shortly thereafter the Virginia pilot came aboard, notified the master that the ship was subject to a penalty because of her position and caused the anchor to be raised. Thereupon the vessel, lacking power, swung around from the southeast heading she had had at anchor to a generally northerly heading area but toward the course on which THE CABINS was proceeding from the south.

The RIO MARACANA'S errors of navigation at this juncture, as the district judge points out in his opinion, were serious. She not only raised her anchor so that she swung helplessly into the path of the oncoming ship, which was approaching buoy 2-A to take on a Maryland pilot, but she made no use of available flares, blinkers or manually controlled signals to warn THE CABINS of the danger. Negligence in the handling of her lights was also found upon testimony which, although conflicting, furnished adequate support for the judge's conclusion. When the pilot came aboard the anchor lights were being displayed but when the anchor was raised the running lights, consisting of a

white masthead light, range lights and colored side lights, were turned on. Two red lights were also displayed in an apparent attempt to comply with the provisions of Rule 4(a) of the International Rules for Navigation at Sea, 33 U.S.C. §145 b(a), which require that a vessel not under control for lack of power shall, in lieu of the white running lights, exhibit two red lights in a vertical line visible for two miles. It seems that the vessel was near the boundary line but actually inside the national waters. The red lights were nevertheless displayed but changes were made in them by hauling down the kerosene lights originally displayed and substituting electric lights for them and at the same time the white running lights and colored side lights were put on so that no adequate or certain information of the helpless condition of the ship was given. Consequently when the anchor was weighed and the ship swung around to the left toward the north the navigators of THE CABINS were understandably confused as to the condition and intentions of the RIO MARACANA.

THE CABINS is nevertheless accused of negligence in failing to take proper prevautions to avoid the collision as she drew near the RIO MARACANA. Evidence accepted by the district judge indicates that THE CABINS arrived at buoy 2-CB off Cape Henry and reduced speed in order to take on a Maryland pilot at buoy 2-A to guide her to Baltimore. Her speed was gradually reduced from the time of her arrival at buoy 2-CB until the time of the collision. As she headed for buoy 2-A her navigators saw the running lights of the RIO MARACANA, then located about a half mile southwest of buoy 2-A and headed in a southerly direc-

tion. THE CABINS then changed her course three or four degrees to the right so as to put the RIO MARACANA on the port bow and pass between her and the buoy. THE CABINS proceeded at a reduced speed and as she drew within two ships' length of the RIO MARACANA she noticed her swinging to the left and apparently directing her course across the path THE CABINS was taking. Thereupon the engines of THE CABINS were put in reverse in an effort to avoid a collision, but when it was seen to be inevitable the engines of the THE CABINS were put full speed ahead with left rudder so as to lessen the impact of the blow, with the result that the bow of the RIO MARACANA struck the port side of THE CABINS at right angle and scraped along the length of the vessel.

It is urged, on behalf of the RIO MARACANA, that more effective efforts should have been taken to avoid the collision by retarding the engines or changing the course of THE CABINS before her navigators realized that otherwise a collision was imminent. But we think the reasons given by the district judge in discussing the facts in his opinion justify his conclusion that negligence on the part of THE CABINS in the emergency caused by the maneuvers of the RIO MARACANA was not proved. The case is a typical one for the application of the established rule that when the fault on the part of one vessel in a collision, sufficient to account for the disaster, is established by uncontroverted proof it is not enough to raise doubts about the management of the other vessel, but in order to hold her liable there must be proof of fault beyond a reasonable doubt. *Whitestock Towing Corp. v. Bethlehem Steel Co.*, 4 Cir., 279 F.2d 419; *The City of New York*, 147 U. S. 72, 85.

Affirmed.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8118

COMPANIA NACIONAL DE NAVEGACAO CASTEIRO PATRIMONIO,

Appellant,

versus

THE CABINS TANKER INDUSTRIES, INC., Owner of the Steamship THE CABINS and TERMINAL TANKER INDUSTRIES, INC., bareboat charterer, as its interest may appear,

Appellees.

ORDER

The Court having heretofore on January 4, 1961 entered its judgment and filed an opinion in the above entitled case and a petition for rehearing having been filed on February 2, 1961;

Now, Therefore, upon consideration of the petition for rehearing,

IT IS ORDERED that the petition for rehearing be, and the same hereby is, denied.

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

The undersigned would grant
the petition for rehearing

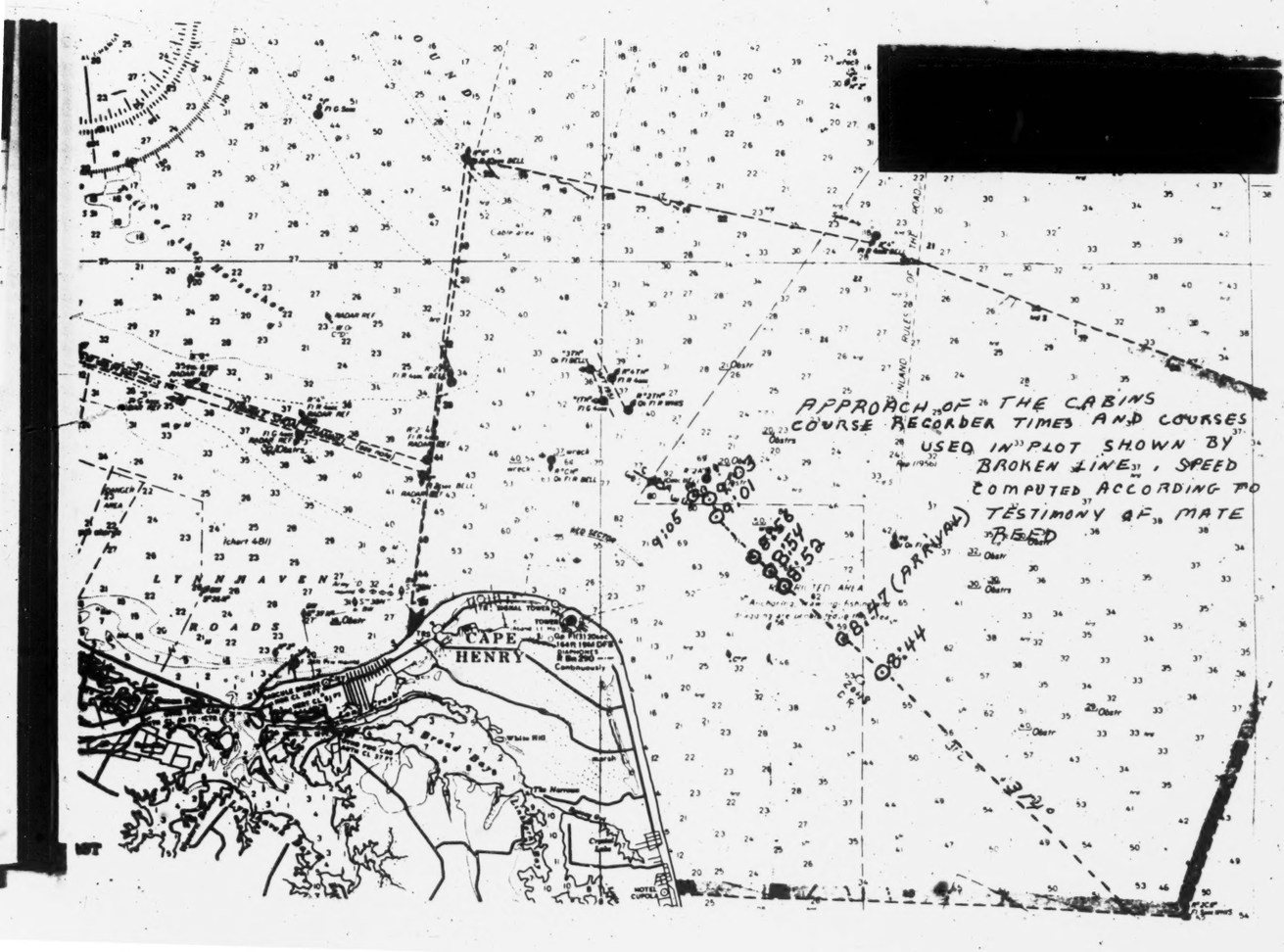
HERBERT S. BOREMAN
United States Circuit Judge

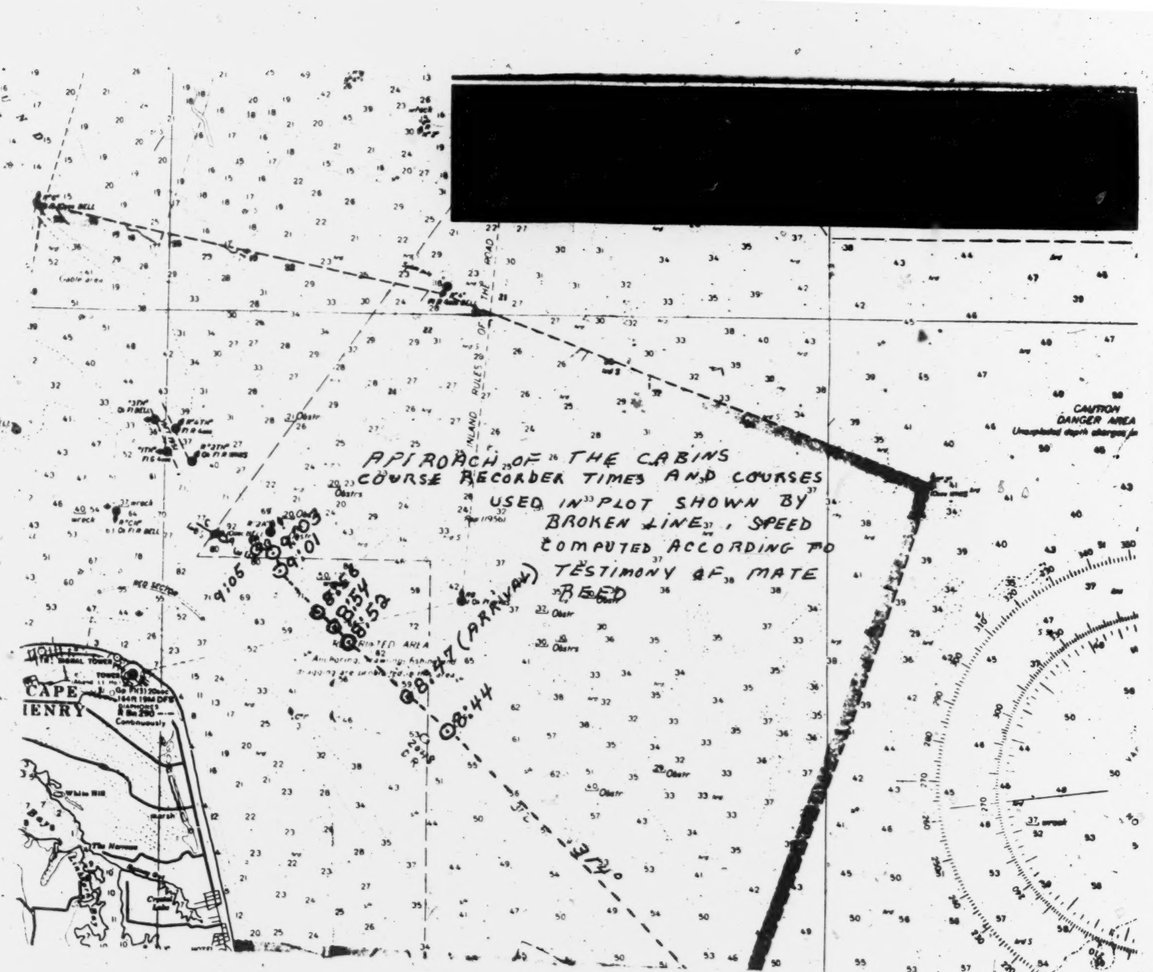
A true copy
Teste:

RICHARD M. F. WILLIAMS, JR., *Clerk*
U. S. Court of Appeals for the
Fourth Circuit
By MARGARET L. DAVIS,
Deputy Clerk

February , 1961.
FILED
FEB. 27, 1961

R. M. F. WILLIAMS, JR.
Clerk


APPROACH OF THE CABINS
COURSE RECORDER TIMES AND COURSES
USED IN PLOT SHOWN BY
BROKEN LINE, SPEED
COMPUTED ACCORDING TO
TESTIMONY OF MATE
REED
9:05
9:03
9:01
8:58
8:54
8:52
8:47 (ARRIVAL)
8:44
CAPE
HENRY
LYNNHAVEN
ROADS


APPROACH OF THE CABINS
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REED
9:05
9:03
9:01
8:58
8:54
8:52
8:47 (ARRIVAL)
8:44
CAPE
HENRY
CAUTION
DANGER AREA

LE COPY

[illegible] R. [illegible]

IN THE

Supreme Court of the United States

October Term, 1960.

No. 859.

COMPANIA NACIONAL DE
NAVEGACAO CASTEIRO PATRIMONIO,

Petitioner,

v.

THE CABINS TANKER INDUSTRIES, INC., Owner of the Steamship "THE CABINS" and TERMINAL TANKER INDUSTRIES, INC., bareboat charterer, as its interest may appear,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SAMUEL B. FORTENBAUGH, JR.,
JAMES F. YOUNG,
1510 Chestnut Street,
Philadelphia 2, Pennsylvania,
LEON T. SEAWELL,
Wainwright Building,
P. O. Box 958,
Norfolk 1, Virginia,
Proctors for Respondents.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 859.

COMPANIA NACIONAL DE NAVEGACAO CASTEIRO PATRIMONIO,

Petitioner,

v.

THE CABINS TANKER INDUSTRIES, INC., OWNER OF THE STEAMSHIP "THE CABINS" AND TERMINAL TANKER INDUSTRIES, INC., BAREBOAT CHARTERER, AS ITS INTEREST MAY APPEAR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

OPINIONS BELOW.

The citations to the opinions of the courts below are set forth in the petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

1. Where one vessel in a maritime collision was admittedly at fault and her errors of navigation contributing to the collision were serious, and there is no clear and convincing evidence of contributory negligence by the other vessel, is it not immaterial whether the court characterizes such lack of proof as not being "beyond a reasonable doubt" or as insufficient to prevent "resolving any reasonable doubt" in favor of such other vessel?

2. Since an appeal in admiralty litigation constitutes a trial *de novo*, is it not proper for the court below to modify, alter or amend a clearly erroneous finding of the trial court, particularly where such revision further supports the conclusion of the trial court as to ultimate liability?

STATEMENT OF THE CASE.

While respondents do not concur with the entire statement set forth by petitioner, the issues posed can be answered by reliance on the opinions below, without detailing a counter-statement.

ARGUMENT.

I. An Erroneous Rule of Evidence Was Not Established by the Court Below With Respect to Burden of Proof in Maritime Collisions.

The court below did not establish an erroneous rule of evidence with respect to the burden of proof in maritime collisions. The court merely reiterated a longstanding principle in slightly different language which nevertheless calls for an identical degree of proof. In other words, both the court below and Mr. Justice Brown in *The City of New York*, 148 U. S. 72, 85 (1893), used the term "reasonable doubt" as their point of reference when considering a case where the faults of one vessel were sufficient in themselves to account for the disaster. It is not enough for such vessel to raise a doubt with regard to the management of the other vessel, since any reasonable doubt will be resolved in favor of the latter. Therefore, as the court below has stated, the proof of fault required must be "beyond a reasonable doubt" to make out a case for apportionment. What the court below has said must necessarily be construed as calling for a conclusion identical in result to that set forth by Mr. Justice Brown. A multitude of cases have cited this principle with approval including *The Oregon*, 158 U. S. 186, 204 (1895) and *The Victory*, 168 U. S. 410, 423 (1897).

The cases cited by the petitioner in support of its argument that issues of fact in civil litigation are determined in accordance with the preponderance of evidence cannot be likened to the present case. *New York Life Insurance Company v. Gamer*, 303 U. S. 161 (1938); *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308 (1902), and *Williams v. Conger*, 127 U. S. 397 (1888). All three cases were civil jury trials wherein the issues raised on appeal in part involved the trial court's charge to the jury.

In maritime litigation the terms "reasonable doubt" and "preponderance of evidence" are not used to determine the "Measure of Jury's Persuasion" as these phrases are

discussed in *Wigmore on Evidence*, 3rd Ed., Vol. 9, §§ 2497, 2498 (1940). Nevertheless, that the degree of proof required is similar to that called for in a criminal case is best borne out by petitioner's citation to *Holt v. United States*, 218 U. S. 245, 253 (1910). Therein the trial judge's charge to the jury regarding reasonable doubt in a criminal case was reviewed and approved. The lower court's charge on reasonable doubt stated in part that ". . . the evidence must be *clear and convincing* and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty." (Italics ours.) Is it not significant that Mr. Justice Brown in the *City of New York, supra*, prefaced the statement regarding reasonable doubt with similar language?

> "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be *clear and convincing.*" (Italics ours.)

The term "clear and convincing" was also used by Chief Justice Fuller in *The Victory, supra*, and it has been used in a multitude of cases since the above decisions.

Finally, even if it is possible to say that the lower court's phrase regarding reasonable doubt was in error, the citations in support of the statement, namely, *The City of New York, supra*, and *Whitestock Towing Corp. v. Bethlehem Steel Co.*, 279 F. 2d 419 (4 Cir., 1960), surely clarify the manner in which it was intended to be used. Further, the admiralty opinions make it clear that there is a burden on one clearly at fault to cast more than a suspicion of fault on the other vessel. Mr. Justice Brown in *The City of New York, supra*, described this as, ". . . some presumption at least adverse to its claim . . .". If the proffered testimony is not sufficient to rebut such a presumption, it is a voyage into semantics to concern ourselves as to whether the court below would have reached a different conclusion

if its rationale had been based upon "a preponderance of the evidence" rather than reciting the requirement of proof "beyond reasonable doubt." For these reasons, the petitioner's argument that a new rule of evidence has been established is without merit.

II. In View of the Findings Made by the Courts Below, the Stated Issues Relating to the Obligation of a Vessel to Maintain a Careful Lookout and Keep Out of the Way of a Drifting Vessel Are Irrelevant.

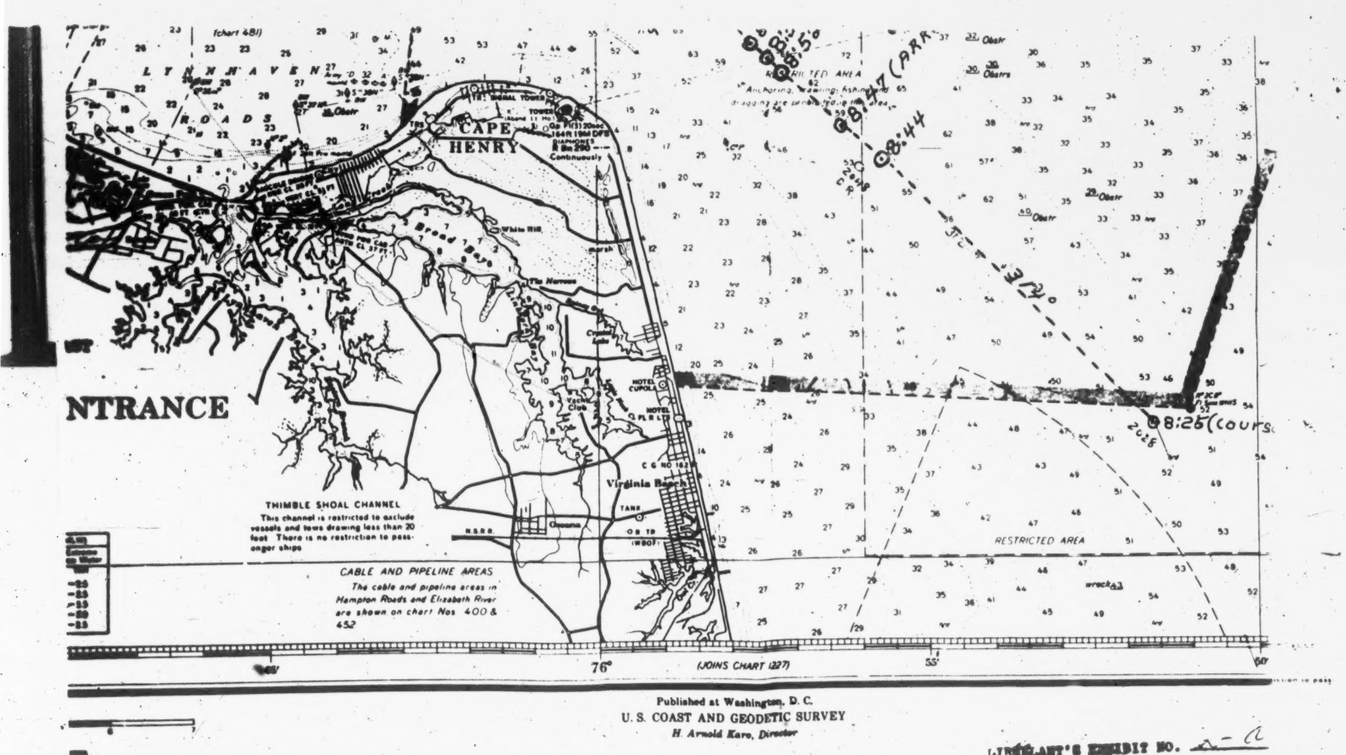
There can be no dispute that a moving vessel must maintain a careful lookout and keep out of the way of a drifting vessel. These are basic principles, but they cannot in any event be applied to the facts as found by the trial judge and affirmed by the court below. We are not here dealing with a case involving the failure of one vessel to become timely aware of the presence of another. The Rio was seen by those in charge of the navigation of The Cabins at a distance of three miles (R. 20a). We are not dealing with a case of a vessel heedlessly ignoring the obvious helplessness of a drifting vessel and needlessly shaping her course too close. Our facts involve two vessels, each amply alerted to the presence of the other, in an area where it is normal for vessels to pass within two shiplengths with a complete failure by the Rio to indicate that

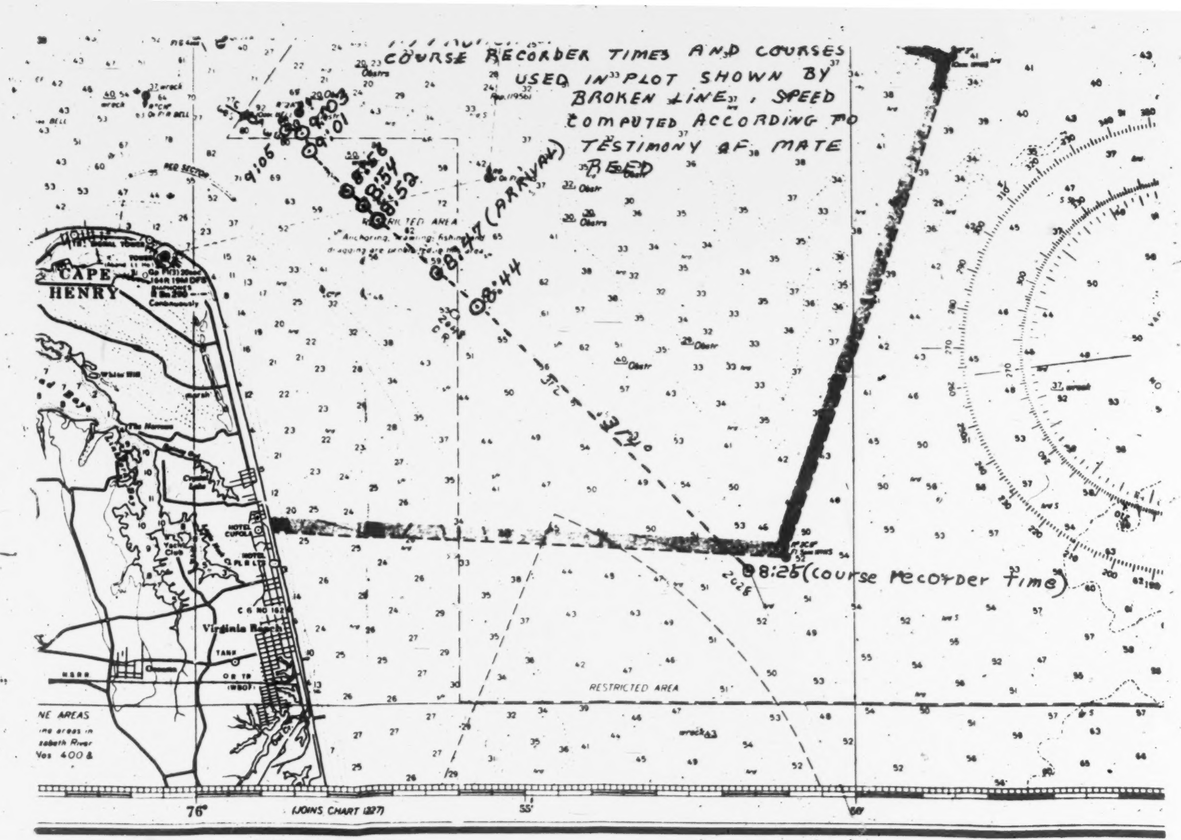
(a) those in charge of her had suddenly become aware that she was anchored in an improper location,

(b) she was without motive power,

(c) but would nonetheless raise anchor and permit herself to be carried, by wind and tide, across the path of an approaching vessel.

Not only did the Rio fail to make use of several means available to warn the Cabins of the impending danger (R. 42a), she also displayed improper lights which could not possibly communicate her "out of command" and


CAPE HENRY
Virginia Beach
RESTRICTED AREA
THIMBLE SHOAL CHANNEL
This channel is restricted to exclude vessels and tows drawing less than 20 feet. There is no restriction to passenger ships
CABLE AND PIPELINE AREAS
The cable and pipeline areas in Hampton Roads and Elizabeth River are shown on chart Nos. 400 & 452
76°
(JOINS CHART 1227)
Published at Washington, D. C.
U. S. COAST AND GEODETIC SURVEY
H. Arnold Karo, Director
LIBELANT'S EXHIBIT NO. A-A


COURSE RECORDER TIMES AND COURSES USED IN PLOT SHOWN BY BROKEN LINE, SPEED COMPUTED ACCORDING TO TESTIMONY OF MATE REED
CAPE HENRY
Virginia Beach
RESTRICTED AREA
8:25 (course recorder time)
76°
(JOINS CHART 1227)
Published at Washington, D. C.
U. S. COAST AND GEODETIC SURVEY
H. Arnold Karo, Director
LIBELANT'S EXHIBIT NO. A-A
(Amick)

"drifting" condition to the CABINS (R. 46a, 47a). On the contrary, the lights displayed indicated ". . . the RIO was under full command" (R. 50a). Nowhere is there a finding that one red light, whenever it was seen by the CABINS, meant or could reasonably be understood to mean the RIO was "out of command" (R. 47a). There is no finding that the CABINS was unaware of the RIO's presence, but there are findings and evidence indicating that the CABINS had no reason to be aware of the danger or the RIO's status until just prior to the collision (R. 52a). From this background the RIO urges that her intentions and maneuvers should have been divined because they were so timed to be of maximum embarrassment to the CABINS' approach as she slowed down in the area of a pilot station, an area where it has been found not unusual for vessels to pass within two shiplengths of each other (R. 49a).

One last point to simply clarify the weakness of the premise upon which petitioner builds its arguments on this issue relates to the RIO's direction of drift. The RIO has urged that there was *no evidence* to support the finding of the trial judge that the RIO drifted ". . . directly toward the path of the CABINS," despite testimony of the RIO's pilot, with some 40 years' experience, that the drift was "To the northward, north-northwest" (R. 38a). This must necessarily have taken her across the 315° or northwesterly course being steered by the CABINS prior to the collision.

Legal principles, no matter how well established, cannot be applied without operative facts; therefore, the RIO, having ignored and completely failed its duty to warn the approaching CABINS, has no foundation from which to advance its contentions and they must fail.

III. It Is Proper for the Court Below to Modify or Amend a Finding of the Trial Court, Particularly When the Modification Is Supported by the Evidence.

It is an established principle that an appeal in admiralty litigation constitutes a trial *de novo*, and a review-

ing court may set aside findings of the trial judge which are deemed to be "clearly erroneous," *McAllister v. United States*, 348 U. S. 19 (1954). Research has not revealed any authority which prevents a reviewing tribunal from properly modifying or altering a finding of the trial judge, and certainly the foregoing principle should hold true when the modification is not only supported by evidence but does not change or alter the end result with respect to liability.

Petitioner bases Point III of its argument on the fact that the trial court found that the anchor of the Rio was aweigh at 2055 or 2056, and she swung from south to north within 2 or 3 minutes, resulting in an interval of 7 or 8 minutes until the collision occurred, whereas the court below amended this finding, by implication, reducing the interval by the finding that the vessels were then only two shiplengths apart.

We need only refer to the opinion of the trial court to realize how uncertain Judge Hoffman was with respect to his finding of the time the Rio raised her anchor (R. 43a):

> "As the Rio made no notation of times, other than when the pilot boarded the vessel at 2040 and the engines again commenced to function at 2143, it is difficult to fix the pertinent times as related to her activities. Certainly it cannot be seriously urged that the anchor was aweigh at 2043 as testified to by the master, chief mate, and others. It is a fair assumption that, with the language barrier existing, a few minutes were spent in conversation and, according to the pilot and second mate, it was a matter of 8 or 9 minutes after she commenced heaving before the anchor was aweigh. An appropriate estimate of the time when the anchor was aweigh is 2055 or 2056."

The court below obviously concluded that the finding was erroneous, accepted the definite testimony of those in charge of The Cabins, and accordingly impliedly modified the finding as to the time when the anchor of the Rio was

aweigh by specific reference to the swing of the Rio being noted by The Cabins as the latter vessel drew within two shiplengths.

This conclusion is supported by testimony of the master and chief officer [1] of The Cabins. It therefore seems apparent that the court below appropriately modified the finding of the trial judge and petitioner is without a foundation upon which to base its complaint.

CONCLUSION.

The issues which the petitioner attempts to pose cannot be supported by law or fact; respondents therefore respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

Samuel F. Fortenbaugh, Jr.,
James F. Young,
Leon T. Seawell,
Proctors for Respondents.

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1. Partial Transcript of Testimony at Trial.

Page 151

William B. Smith, Captain

Q. At that time, 2105, would you describe the position of the Rio Maracana and the lights you saw.

A. At that time, she had swung around and was showing a green running light, heading directly towards me. At the same time, I sighted his green side light, I saw a red light above his bridge house.

* * *

Q. What was his distance away (at 2105)?

A. About two ship lengths.

Page 34

Charles A. Reed, Chief Officer

Q. What was the vessel doing at this time? The other vessel which you have designated as the Rio Maracana.

A. At that time, at 2105, the approaching vessel had altered course again to show that she was coming directly toward us, with just the starboard or green side light showing.